84-713
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 82-3159

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiffs-Appellants,

v.

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants-Appellees.

May 3, 1984

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Douglas Hendriksen, Kennedy Space Center, Fla., for NASA.

James M. Blue, Tampa, Fla., June Wagoner Edwards, U.S. Dept. of Justice, Washington, D.C., for TWA Services, Inc.

Appeal from the United States District Court
for the Middle District of Florida

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

This appeal involves the application of the Service Contract Act of 1965, (SCA) as amended, 41 U.S.C. §§ 351

to 353 (1976), to the Concession Agreement entered into between TWA Services, Inc. (TWAS), and the National Aeronautics and Space Administration (NASA), for the Visitors Information Center (VIC) at the Kennedy Space Center.

The district court found that the SCA covers the VIC Concession Agreement, but that the plaintiff is not entitled to recover from TWAS retroactive wage and fringe benefits between the date of the succession of TWAS under the Concession Agreement and the date of judicial declaration of coverage. The district court also found that mandamus does not lie to compel the Secretary of Labor to issue a retroactive wage determination for the period in question, or to compel NASA to amend the Concession Agreement to reflect this retroactive wage determination. Plaintiff asserts that these determinations are erroneous as a matter of law. We disagree and affirm.

TWAS has operated the VIC at the Kennedy Space Center since 1968 under a Concession Agreement with NASA, under the terms of which TWAS provides bus tours to visitors to the VIC, sells souvenirs, and maintains a cafeteria which caters to VIC visitors. In November 1978 the Concession Agreement was modified (Modification 9 to NAS 10-5755) by which TWAS agreed beginning November 8, 1978, to perform the landscaping function at the VIC which had previously been performed by Expedient Services, Inc. (ESI) pursuant to a base-wide contract under which ESI performed all the roads and ground maintenance work at the Center. ESI was a non-union company, its employees were not covered by a collective bargaining agreement. Likewise, TWAS assumed responsibility for facility maintenance at the VIC on January 1, 1979, which, prior to Modification 9, had been performed by Boeing Services International (BSI) whose contract with NASA required it to perform maintenance at all other center facilities. The employees of

BSI who performed these functions were represented by the plaintiff union and were covered by a collective bargaining agreement. The contracts between BSI and ESI and NASA were treated as covered by the Service Contract Act.

At the time of the transfer of the work to TWAS, there were no employees transferred from either BSI or ESI, nor were the BSI or ESI forces reduced, and both companies continued to perform the facilities and landscape maintenance functions throughout the center, except at the VIC. The additional work transferred to TWAS by Modification 9 was performed by new hires of TWAS. As a result, no individual was ever paid less money than he was being paid under any prior contractual arrangement.

From the time that TWAS was first awarded the VIC concession in 1968, NASA took the position that the concessionaire agreement was exempt from the SCA by virtue of the statute and 29 C.F.R. § 4.133, a Department of Labor regulation exempting from the coverage of the Act concessionaire agreements at national parks.[1]

The conclusion reached by NASA was also in reliance upon a 1973 amendment to the National Aeronautics and Space Act of 1958[2] which granted to the NASA Ad-

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[1] Section 4.133(b) provides:

> It is not considered that the Act was intended to cover every contract, however, which is entered into with the government by a contractor to furnish services, no matter how indirect or remote a benefit the government may derive therefrom. If, for example, a contract with the government grants the contractor the privilege of operating as a concessionaire in a government park for the purpose of furnishing services to the public generally rather than to the government or to personnel engaged in its business, the contract is not considered subject to the Act. . . .

29 C.F.R. § 4.133 (1983).

[2] Act of July 23, 1973, Pub.L. No. 93-74, § 6, 87 Stat. 171, 174 (amending National Aeronautics and Space Act of 1958 § 203(b),

ministrator discretionary authority to enter into Concessionaire Agreements to provide facilities for visitors to NASA centers. 42 U.S.C. § 2473(c)(11) (1976). This amendment was intended to grant NASA authority similar to the authority granted the U.S. Parks Service to provide visitor services at national parks by Concessionaire Agreements.[3]

Beginning in 1973 there was an exchange of letters between the Department of Labor and NASA, the former asserting that the Concessionaire Agreement was subject to the SCA, and the latter responding that it was exempt from SCA. At the time of Modification 9, when the scope of the work was modified to include landscaping and facility maintenance at the VIC, the coverage issue was raised again but the Department of Labor took no step to compel NASA to require compliance by TWAS with § 353(c).[4]

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42 U.S.C. 2473(b)) (current version at 42 U.S.C. § 2473(c)(11) (1976)).

[3] S.Rep. No. 179, 93d Cong., 1st Sess. 106 (1973); HOUSE COMM. ON SCIENCE AND AERONAUTICS, H.R.Doc. No. 171, 93d Cong., 1st Sess. 178, 179 (1973).

[4] (c) Predecessor contracts; employees wages and fringe benefits

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective bargaining agreement as a result of arm's-length negotiations, to which service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

41 U.S.C. § 353(c) (1976).

Suit was instituted on August 20, 1979 by plaintiff. On November 17, 1981, the district court ruled that the SCA applied to the VIC Concession Agreement entered into between TWAS and NASA and further found that the 29 C.F.R. § 4.133 exemption did not apply to the VIC Concession.[5]

On August 13, 1982 the Department of Labor issued a wage determination applicable to the VIC Concession Agreement effective as of November 17, 1981, the date of the district court's coverage ruling.

After a non-jury trial the district court entered a final judgment denying the relief sought by plaintiff.

The remedy plaintiff seeks is to recover the difference in wages and fringe benefits actually paid from those that would have been paid if the 1978 wage determinations had been made part of the VIC Concession Agreement. Further, it seeks the difference in wage and fringe benefits actually paid and those that would have been paid had subsequent wage determinations been issued for the new VIC Concession Agreement entered into between NASA and TWAS in 1979.

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[5] The district court found *inter alia:*

> Assuming, without specifically ruling on the issue, that 29 C.F.R. § 4.133 constitutes a grant of exemption from the coverage of the SCA *pursuant to the Secretary's authority under § 353(b)*, there is no indication that the exemption so granted applies to the VIC concession contract. There is no mention of the VIC contract in the regulation. Nor is there any evidence that the Secretary has satisfied the procedural and substantive safeguards required by the Act prior to reaching a determination that the VIC contract should be exempted from the coverage of the Act. In the absence of such evidence, the Court finds that 29 U.S.C. § 4.133 has no application to the question presented by the facts herein. In reaching this determination the Court finds it unnecessary to consider further plaintiff's request to declare 29 C.F.R. § 4.133 null, void, and of no force and effect. (Emphasis added)

Essentially, plaintiff asserts two causes of action. Against NASA we are asked by mandamus to compel NASA to request an appropriate wage determination, to compel the Department of Labor to issue them, and to compel the agencies to enforce the wage determinations retroactively against TWAS. Against TWAS, plaintiff seeks to recover directly for the differences.

Taking the contentions in inverse order, we hold that the plaintiff cannot maintain a private right of action against TWAS under the SCA.[6]

Plaintiff lays great stress upon the undisputed fact that the 1972 amendment[7] adding subsection (c) of § 353 was prompted by Congress' dissatisfaction with the Secretary's inconsistent administration of the Act in granting exemptions from coverage. Building upon this premise, plaintiff contends that while it may be arguable that it did not have standing prior to 1972, the amendments created a private right of action thereafter. Plaintiff suggests that § 353(c) imposes a mandatory obligation directly upon private parties, i.e., successor government service contractors. Moreover, it argues that the prohibitory language creates a correlative right in the employees of successor contractors that include plaintiff in this case.

Plaintiff submits that there is nothing in the legislative history of SCA that indicates that Congress meant to exclude private actions for enforcement of § 353(c). Finally it argues that there is a private right of action under § 353(c) that must be distinguished from the administrative remedies available to the Secretary in § 352.

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[6] The district court assumed without deciding that the plaintiff could maintain a private right of action against TWAS, but held that it would nonetheless deny plaintiff relief.

[7] Act of Oct. 9, 1972, Pub.L. No. 92-473, § 3, 86 Stat. 789, 789 (amending Service Contract Act of 1965 § 4, 41 U.S.C. § 353 (1970)).

For these reasons, plaintiff urges us to disavow the holding of the Ninth Circuit in *Miscellaneous Service Workers, Local 427 v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981). We are unpersuaded.

In *Philco-Ford*, the court properly pointed out that the "question of whether a private right of action is conferred by a federal statute is essentially one of interpreting congressional intent," and then looked to the test announced in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), as follows:

> (1) Is the plaintiff "one of a class for whose especial benefit the statute was created?" (2) Is there any indication of a legislative intent to fashion such a remedy? (3) Is it consistent with the underlying legislative scheme to imply such a remedy? (4) Is the cause of action one traditionally relegated to state law, so that a federal cause of action would be inappropriate?

661 F.2d at 780 (citing *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975).

In applying the test, the court found that the first question must be answered affirmatively, because the legislative history of the 1972 amendments make clear that they were enacted for the benefit of employees providing service work under government contracts. *Id.*

Concerning the legislative history, the court found that "it is apparent that nothing supports the inference of a legislative intent to create private remedies under the act." *Id.* Rather, the focus was upon a " 'more efficient *administration*' of the SCA by *narrowing the Secretary's discretion* in deciding whether to issue a wage determination for all government service contracts." [8] Moreover, the court continued, "it would be flatly inconsistent with

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[8] 661 F.2d 776 (citing S.Rep. No. 1131, 92d Cong., 2d Sess. 5 (1982); *reprinted in* 1972 U.S. CODE CONG. & AD.NEWS 3534, 3535).

the express provision of a limited governmental cause of action to imply a wide-ranging private right of action as an alternative to a government suit." 661 F.2d at 780.

Finally, the court noted that other courts that have considered the question have concluded that there is no implied private right of action under the SCA. *Id.* at 781 (citing *International Ass'n of Mach. & Aero. Wkrs. v. Hodgson*, 515 F.2d 373 (D.C. Cir. 1975); *Service Employees International, Local No. 36 v. General Services Administration*, 443 F.Supp. 575, 580 (E.D. Pa. 1977); *Dodd v. Blackstone Cleaners*, 61 Labor Cases (CCH) ¶ 32,281 (N.D. Tex. 1969)).

The Ninth Circuit's in-depth analysis of the SCA, and its correct application of the *Cort* test, fully supports its conclusion that both before and after the 1972 amendments, Congress did not intend to authorize private suits to enforce the Act. We agree.

The lack of a private right of action under the SCA is also discussed in *Hodgson*, 515 F.2d 373, where as here, a service contract was awarded without a wage determination by the Secretary of Labor and thereafter such a determination was made prospectively. The union sued to recover the higher wages that would have been due in the interim period. The court denied relief, saying:

> Under Section 3(a) the party responsible for the violation of a wage determination is liable for the amount of underpayment. In this case, however, there simply was no wage determination for the Boeing Company to violate, and the lack of such a wage determination should not be ascribed to Boeing. This is particularly true where as here, the Union ascribes the omission of a wage determination to the Secretary . . . While the injury to the Union members may be the same as it would be where a wage determination is violated, the causation is not. The

lack of a wage determination provision in the contract is not attributable to any action by Boeing. It is attributable only to the Secretary of Labor.

The enforcement of Section 3(a) is by statute the province either of the head of the contracting agency or the Secretary of Labor. When the Secretary issued the wage determination effective February 1, 1972, Boeing complied. Boeing has not violated that wage determination or any other which is applicable here.

. . . .

The Union further argues as between the innocent employees who received reduced wages and the Boeing Company that Boeing should stand the loss because Boeing is not entitled to rely upon a contract illegally made. Yet it is the Secretary of Labor who allegedly acted wrongfully in omitting the wage determination. Boeing was entitled to bid on the specifications as it found them. . . .

. . . .

[T]he Act does not provide any remedy against employers for the alleged omission of the Secretary of Labor. . . .

. . . . The demand cannot succeed not only because the Act does not provide such a remedy, but also because the Boeing Company has not violated the Act.

515 F.2d at 379.

We recognize that the court's holding in *Hodgson* applied to the 1965 Act prior to the 1972 amendments and that the *purpose of the Amendments was to restrict the Secretary of Labor's discretion not to issue a wage determination.* (Emphasis added). We, however, do not share the view of plaintiff that the Amendments created a private right of action, rather, we endorse, as did the

court in *Philco-Ford, supra,* the *Hodgson* court's observation that "[T]he 1972 Amendments do not create new remedies against contractors." 515 F.2d at 379, n.9.

We hold that plaintiff cannot maintain a private right of action under the SCA against TWAS.

Plaintiff's alternative argument is that if there is no private right of action under the SCA, it may maintain this suit under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1982). Plaintiff does not take issue with the district court's finding that there was no agreement between the parties to incorporate the wage and fringe benefits paid by TWAS' predecessors *nunc pro tunc* if Modification 9 and its successors were held to be covered, but argues that the wages and fringe benefits were incorporated in the contract by operation of law. We disagree. We have found no case and plaintiff has cited none that would authorize a suit under § 185 where the contract is silent on the issue the Union attempts to enforce against the employer. TWAS followed the contract as written and was required to do no more. *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 101 S.Ct 1437, 67 L.Ed.2d 641 (1981) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) relied upon by plaintiff are inapposite. *Barrentine* was a suit brought by employees under the Fair Labor Standards Act, 29 U.S.C. § 201-219 (1976) for compensable time denied them. *Alexander* was a suit brought under Title VII of the Civil Rights Act of 1964 for discriminatory discharge. Both cases held that an arbitration decision against the employees under a collective bargaining argeement could not foreclose claims of the employees based upon rights arising out of statutes designed to provide minimum substantive guarantees to individual workers, since both statutory schemes *provided broad access to the courts.* In these cases the courts did not incorporate in the contracts by operation of law the provisions of statutory

law it invoked as plaintiffs would have us do here. Instead, as the court said in *Barrentine*, citing *Alexander*, "The court found that in enacting Title VII Congress had granted individual employees a non-avoidable public right to equal opportunities that was separate and distinct from the rights created through the 'majoritarian process' of collective bargaining." *Id.* 101 S.Ct. at 1443 (citing *Alexander*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147). The rights created by the collective bargaining agreement and the rights created by statute are separate and distinct with the right of the employee under Title VII and the FSLA to bring suit spelled out in the statutes. We are not persuaded by these non-analagous decisions under Title VII and the FSLA that plaintiff may proceed against TWAS under LMRA's § 301.[9]

We now turn to the plaintiff's asserted cause of action against the federal defendants in which it seeks a writ of mandamus ordering the Secretary of Labor to issue a wage determination embodying BSI and ESI wage rates retroactively to Modification 9 of the completed Concession Agreement NAS 10-755, computation by the Secretary of the amount of unpaid compensation allegedly due to employees performing work under the completed VIC contracts, withholding from NASA of amounts due TWAS and depositing them in a special fund, and an order by the Secretary to NASA to pay all sums withheld directly to the TWAS employees in question. We hold that the Secretary has no clear and undisputed duty to compel TWAS to pay for his mistake, and, further, hold that the equities do not dictate the relief sought by the plaintiff.

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[9] Plaintiff's argument that § 353(c) is self-executing and therefore TWAS was bound to pay no less wages and benefits than its predecessors ESI and BSI give us little pause. We agree with the district court that it would "be an absurd proposition to charge one with knowledge of SCA coverage by operation of law, when those whose job it is to enforce the law have stated otherwise."

Plaintiff takes issue with the district court's characterization as "legally erroneous" NASA's and the Secretary's treatment of the VIC concession contracts as not covered. Plaintiff insists that the non-issuance of a wage determination was "ultra vires", and that the back wage payments, retroactive to the effective date of the Secretary's misinterpretation, must be made to employees who would have been covered had the Secretary interpreted the Act correctly in the first place. *See Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944). In this way the injured parties will be placed in the situation they would have occupied if the wrong had not been done. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Pointing out that § 358 in terms applies to "all contracts subject to this chapter" and that "[o]bligatory Congressional enactments are held to govern federal contracts," *G.L. Christian & Associates v. United States*, 320 F.2d 345, 351, 160 Ct.Cl. 58 (1963), plaintiff argues that the contract must be construed to be covered as a matter of law and neither the contracting agency nor the Secretary is authorized to treat it as not covered. *Ergo*, an action based upon an ultra vires non-coverage determination is a breach of a mandatory legal duty. But it is not that simple.

> It is hornbook law that mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling cases. Though it is a legal remedy, it is largely controlled by equitable principles and its assurance is a matter of judicial discretion. Generally speaking, before the writ of mandamus may properly issue, three elements must coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.

Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970) (footnotes omitted); *See Whitehouse v. Illinois Central Railroad Company*, 349 U.S. 366, 75 S.Ct. 845, 99 L.Ed. 1155 (1955).

We are not persuaded that there is a clear right in the plaintiff to the relief sought. As we have previously explicated, the SCA does not confer on the plaintiff a private right of action for its enforcement. It is obvious that plaintiff seeks relief by way of mandamus from the federal defendants solely as a means of obtaining back wages from TWAS. Lacking such a right directly under the statute, it urges the court to compel the defendants to undertake actions which would indirectly result in the same back wages from TWAS that it is precluded from seeking directly. We refuse to blind ourselves to the inequity of granting plaintiff relief which is not an end in itself but is merely a means to an end which plaintiff could not obtain except by this end run. We will not put our imprimatur on such an artful misuse of the extraordinary remedy of mandamus.

Moreover, we find no "clear, ministerial and nondiscriminatory" duty, *Kirkland Masonry, Inc. v. Commissioner*, 614 F.2d 532, 533-34 (5th Cir. 1980) on the part of NASA to the plaintiff to retroactively modify the fully completed Concession Agreements. We find no statutory *or regulatory* (emphasis added) language which supports plaintiff's demand for such unilateral retroactive relief.

Finally, we share the district court's findings that upon equitable considerations a mandatory injunction should not issue compelling retroactive wage determinations. The wage determinations were not made because of NASA's view that the contract was not subject to the Act. In this litigation the Secretary took the same position. TWAS was not at fault for any failure to comply with the SCA, yet granting the relief sought by plaintiff

will result in no harm to the federal defendants but would directly penalize TWAS. In fact, TWAS, has simply not violated the SCA.

We are not moved by plaintiff's argument that TWAS is not entitled to equitable consideration because it was aware of and assumed the risk that the coverage question might ultimately be decided against it. It is undisputed that TWAS and plaintiff made a joint trip to Washington during the recompetition period preceding the awarding of the current Concession Agreement and sought to have the Department of Labor issue an SCA wage determination. This attempt was unavailing. Although the plaintiff had been in dispute with NASA since 1966 concerning coverage of the SCA to Concession Agreements, it sought no judicial intervention to test SCA coverage until 1979, after TWAS had been selected, based on a bid which did not include SCA minimums. In view of these circumstances it would be manifestly inequitable for the plaintiff, at this late date, to shift the blame to TWAS and penalize it for plaintiff's lethargy in pursuing the coverage issue.

The district court exercised sound discretion in refusing to issue the writ of mandamus.[10]

AFFIRMED.

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[10] Plaintiff challenges the validity of 29 C.F.R. § 4.133(b) and seeks declaratory and injunctive relief under 5 U.S.C. § 704 (1982), the Administrative Procedure Act. Judge Young found that the regulation was not applicable to the VIC concession contracts and, on that ground, declined to pass upon whether the regulation was forbidden by § 353(b). For the purposes of this case, that removed the regulation from further consideration. Now, plaintiff invites us to revisit the issue because on some other day, in some other court, the Secretary's *proposed amendment* to the regulation (which so far as we know was not before the district court) and which has not and may never be adopted, might be an issue. This we decline to do.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-3159

D.C. Docket No. 79-00405

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiffs-Appellants,

versus

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This case came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 3, 1984

For the Court: SPENCER D. MERCER, Clerk

By: /s/ [Illegible]
Deputy Clerk

Issued as Mandate: July 20, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-3159

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiff-Appellants,

versus

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants-Appellees.

[Filed July 5, 1984]

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 3, 1984, 11 Cir., 198—, —— F.2d ——)

(July 5, 1984)

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-Orl-Civ-Y

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
and RAYMOND J. DONOVAN, SECRETARY OF LABOR
Defendants.

[Filed Nov. 17, 1981]

MEMORANDUM OPINION

This cause came before the Court for hearing on the various pending motions for summary judgment. Oral argument was presented on the principal issue raised in the pleadings, whether the requirements of the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351, *et seq.* are applicable to the concession agreement entered into between TWA Services, Inc. and the National Aeronautics and Space Administration (NASA) for the Visitor Information Center (VIC) at Kennedy Space Center. For the reasons stated more fully below, the Court finds that the Act does apply to the VIC concession agreement.

TWA Services, Inc. has operated the VIC at Kennedy Space Center since 1968 pursuant to a concession agreement with NASA. As part of its initial responsibilities under the agreement, TWA Services provided bus tours to visitors to the VIC, sold souvenirs, and maintained a cafeteria catering to VIC guests. Pursuant to a modification to the concession agreement in 1978, TWA Services agreed to perform and be responsible for the maintenance and operation of the VIC facilities and house trailers and the furnishing of all labor, material, equip-

ment, tools, and supervision for landscape maintenance of the area immediately around the VIC.[1] Prior to the modification, the facility maintenance was performed by Boeing Services International (BSI) and landscape maintenance was performed by Expedient Services, Inc. (ESI) pursuant to contracts between these two companies and NASA to maintain the entire Kennedy Space Center. The contracts between BSI and ESI and NASA pursuant to which these services were rendered were treated as covered by the SCA.

When TWA Services assumed responsibility for the facility and landscape maintenance there were no employees transferred from either BSI or ESI to TWA to perform these services, nor were employees who previously performed these jobs laid off from either BSI or ESI. The additional work was manned by new employees hired by TWA Services. Plaintiff is the collective bargaining representative of those job classifications including but not limited to groundskeepers, gardeners, and general plant maintenance technicians.

In the amended complaint filed May 28, 1981, plaintiff seeks declaratory and injunctive relief against an alleged invalid regulation of the United States Department of Labor; an order compelling defendants Secretary of Labor, NASA, and TWA Services, Inc. to comply with the SCA; and damages against TWA Services for alleged underpayment of wages in violation of that Act. Defendants have each filed motions for summary judgment in which they contend that the SCA does not apply to the VIC concession agreement. In support thereof, defendants argue that the work in question is a concession contract which is for the purpose of furnishing services to the public generally rather than to the government and that such concession contracts are not covered by the SCA. In addition, defendants urge that even if concession

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[1] TWA Services has not, at any time relevant to these proceedings, assumed responsibility for facility or landscape maintenance for any part of the Kennedy Space Center other than the VIC.

contracts are covered by the SCA, the Secretary of Labor, acting pursuant to his discretionary authority under section 4(b), 41 U.S.C. § 353(b), has exempted concession contracts which provide services of "indirect or remote" benefit to the Government from the Act's coverage provisions.

The SCA was originally enacted to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for governmental agencies of the United States. S.Rep. No. 798, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 3737, 3737. Like the Fair Labor Standards Act, the SCA is remedial [2] labor legislation and thus its provisions must be liberally construed to effectuate the Act's humanitarian purposes of providing minimum wage and fringe benefit protection to individuals performing contracts with the federal government. *Midwest Maintenance & Const. Co.* v. *Vela*, 621 F.2d 1046, 1050 (10th Cir. 1980); *Brink's, Inc.* v. *Board of Governors etc.*, 466 F. Supp. 116, 120 (D.D.C. 1979).

Section 351(a) of the SCA provides in pertinent part:

> "Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500.00 except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to

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[2] 29 C.F.R. § 4.123(b)(1) further expresses the remedial purpose of the Act to "protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards, and whose saving in labor cost therefrom enables them to offer a lower price to the Government than can be offered by the fair employers who maintain the prevailing standards." *See also Int'l Ass'n of Mach. & Aerospace Workers* v. *Hodgson*, 515 F.2d 373, 375 (D.C. Cir. 1975) (purpose of SCA is to insure that service employees working on government contracts are not paid wages below the prevailing wages being paid in the locality by non-government contractors).

> furnish services in the United States through the use of service employees shall contain the following: [provisions specifying minimum wages and fringe benefits as determined by the Secretary of Labor, in accordance with the prevailing rates and benefits for such employees in the locality or pursuant to a collective bargaining agreement.]"

In support of their contention that the SCA does not apply to concession contracts such as the one at issue here, defendants cite to comments made in 1966 by one of the sponsor's of the Act while discussing amendments to the Fair Labor Standards Act (FLSA). In response to a question by Congressman Udall inquiring whether certain provisions of the FLSA were intended to apply only to those contracts that primarily benefit the government and not the public, Congressman O'Hara of Michigan stated:

> "The coverage of Section 305 is based upon the coverage of the Service Contract Act of 1965. It applies to employees of an employer who has contracts subject to that act. Therefore, the question is whether or not a particular employer is subject to the Service Contract Act of 1965.
>
> At that point, the question is whether the particular contract is a service contract with the government or a concession contract in which the service is not performed primarily on behalf of the government or its employees?
>
> I would simply have to say to the gentleman that if the contract is a true concession and the service is provided to government employees and others, but the service to government employees is only incidental to the major purpose of the concession, certainly it would not be covered under the Service Contract Act or by Section 305 of this bill."

112 Cong. Rec. H11366 (daily ed. May 25, 1966).

The Court is not persuaded by the Udall-O'Hara post enactment colloquy. The SCA does not explicity, or im-

plicitly, exclude concession contracts from its coverage. It states that "[e]*very contract* . . . entered into by the United States . . . the principal purpose of which is to furnish services . . . through the use of service employees" shall be subject to its provisions. 41 U.S.C. § 351(a). "Service employees" are further defined in §357(b) as persons "engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title[3] . . . the principal purpose of which is to furnish services in the United States."

In *United States* v. *Rutherford*, 442 U.S. 544 (1979), the Supreme Court held:

> "If a legislative purpose is explained in 'plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms.' Exceptions to clearly delineated statues will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of enactment as a whole.
>
> . . . .
>
> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributable to congressional design will an exception to statutory language be judicially implied."

442 U.S. at 551-52, 555 (citations omitted).

The language of § 351(a) is clear and unambiguous. Congressman O'Hara's isolated comment cannot change the effect of the plain language of the statute itself. *See Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 714 (1978). In the absence of any contemporaneous or pre-enactment legislative history to the

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[3] All parties agree that none of the exemptions set forth in section 356 are applicable to this action.

contrary, and pursuant to the duty of federal courts to liberally construe provisions of remedial legislation such as the SCA, the Court finds that concession contracts such as the VIC contract are covered by the SCA.

As noted previously, defendants contend that even if concession contracts are covered by the SCA, the Secretary of Labor, acting pursuant to his discretionary authority under section 4(b), 41 U.S.C. § 353(b), has exempted concession contracts which provide services of "indirect or remote" benefit to the government from the Act's converage provisions. Section 353(b), as amended in 1972, provides:

> "The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards."

Soon after the implementation of the SCA, the Secretary promulgated 29 C.F.R. § 4.133, which provides:

> "Government as beneficiary of contract services.
>
> (a) In general. The Act does not say to whom the services under a covered contract must be furnished; so far as its language is concerned, it is enough if the contract is 'entered into' by and with the Government and if its principal purpose is 'to furnish services in the United States through the use of service employees.' The legislative history indicates an intention to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose

needs it is necessary or desirable for the Government to make provision for such services. Such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations, for example, were specifically referred to. Where the principal purpose of the Government contract is to provide these or other services to the Government or its personnel through the use of service employees, the contract is within the general coverage of the Act regardless of the source of the funds from which the contractor is paid for the service and irrespective of whether he performs the work in his own establishment, on a Government installation, or elsewhere. The fact that the contract permits him to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not require a different conclusion.

(b) Special situations. It is not considered that the Act was intended to cover every contract, however, which is entered into with the Government by a contractor to furnish services, no matter how indirect or remote a benefit the Government may derive therefrom. If, for example, a contract with the Government grants the contractor the privilege of operating as a concessionaire in a Government park for the purpose of furnishing services to the public generally rather than to the Government or to personnel engaged in its business, the contract is not considered subject to the Act. Since the statute itself provides no clear line of demarcation, questions of contract coverage where doubt arises because of remoteness of benefit to the Government from the services to be furnished should be referred to the Office of Government Contract Wage Standards for resolution."

Defendants contend that this regulation immunizes from the Act's requirements the VIC concession contract.

The Secretary's authority to grant exemptions from the coverage of the SCA is conditioned on certain procedural and substantive safeguards. Section 353(a) provides that sections 38[4] and 39[5] of Title 41, United States Code, govern the Secretary's authority to "make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact. . . ." In addition, the amendments to section 353(b) require not only that the Secretary determine that the exemption is necessary and proper in the public interest, but also require that the Secretary determine that the exemption is in accord with the remedial purpose of the SCA to protect prevailing labor standards.

Assuming, without specifically ruling on the issue, that 29 C.F.R. § 4.133 constitutes a grant of exemption from the coverage of the SCA pursuant to the Secretary's authority under § 353(b), there is no indication that the exemption so granted applies to the VIC concession con-

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[4] 41 U.S.C. § 38 provides, in pertinent part:

> "The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in . . . this title . . . . The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions . . . of this title."

[5] 41 U.S.C. § 39, provides, in pertinent part:

> "Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions . . . of this title, . . . the Secretary of Labor . . . shall have the power to hold hearings. . . . [A]nd [the Secretary of Labor] shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretray of Labor or authorized representatives shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions . . . of this title."

tract. There is no mention of the VIC contract in the regulation. Nor is there any evidence that the Secretary has satisfied the procedural and substantive safeguards required by the Act prior to reaching a determination that the VIC contract should be exempted from the coverage of the Act. In the absence of such evidence, the Court finds that 29 C.F.R. § 4.133 has no application to the question presented by the facts herein. In reaching this determination the Court finds it unnecessary to consider further plaintiff's request to declare 29 C.F.R. § 4.133 null, void, and of no force and effect.

DATED this 17th day of November, 1981.

/s/ George C. Young
Senior United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-Orl-Civ-Y

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

[Filed Nov. 17, 1981]

ORDER

In accordance with the Memorandum Opinion filed simultaneously herewith, it is

ORDERED that the motions for summary judgment filed by defendants be and are hereby denied. The parties shall have thirty (30) days from date hereof within which to advise the Court of issues remaining to be litigated in this proceeding.

SO ORDERED in Chambers at Orlando, Florida, this 17th day of November, 1981.

/s/ George C. Young
Senior United States District Judge

Copies to:

All counsel of record.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 79-405-Arl-Civ-EK

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

[Filed Jul. 19, 1982]

ORDER

This cause is before the Court on plaintiff's motion for reconsideration of declination to pass on the legality of DOL Regulation, 29 C.F.R. § 4.133(b); upon consideration, it is,

ORDERED that the motion be and is hereby denied.

DONE and ORDERED in Chambers at Orlando, Florida, this 19th day of July, 1982.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies mailed to
all counsel of record.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-Orl-Civ-Y

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

[Filed Sep. 24, 1982]

MEMORANDUM OPINION

This case involves the application of the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. § 351, et seq., to the Concession Agreement entered into between TWA Services, Inc. (TWAS), and the National Aeronautics & Space Administration (NASA) for the Visitor Information Center (VIC) at Kennedy Space Center.

The facts involved in this matter are largely undisputed. All of the evidence received by the Court at the Final Hearing in this matter was in the form of documents and depositions. The evidence reveals that TWAS has operated the VIC at Kennedy Space Center since 1968 pursuant to a Concession Agreement with NASA. Pursuant to this Agreement, TWAS provided bus tours to visitors at the VIC, sold souvenirs to visitors, and

maintained a cafeteria catering to VIC visitors. In November, 1978, the Concession Agreement was modified, at which time TWAS assumed the additional responsibility of landscape maintenance at the VIC (Modification 9). Pursuant to the same modification, in January of 1979 TWAS assumed responsibility at the VIC for maintenance of the facility. Prior to the modification of the Concession Agreement, landscaping services were performed by Expedient Services, Inc. (ESI) and maintenance services were performed by Boeing Services International (BSI) pursuant to contracts betwen these two companies and NASA to maintain the entire Kennedy Space Center. The contracts between these companies and NASA for providing the services were treated as covered by the SCA.

When TWAS assumed responsibility for the facility and landscape maintenance, there were no employees transferred from either BSI or ESI to TWAS to perform these services nor were employees who previously performed these jobs laid off from either BSI or ESI. BSI and ESI continued with the remaining portions of their contracts for work at the Kennedy Space Center with the exception of the VIC. The additional work to be performed at the VIC by TWAS was performed by new employees hired by TWAS.

Plaintiff, District Lodge # 166, International Association of Machinists and Aerospace Workers, is the collective bargaining representative of those job classifications including but not limited to groundskeepers, gardeners and general plant maintenance technicians who are employed by TWAS and perform the additional work which became TWAS' responsibility pursuant to the Modification to the Concession Agreement. Plaintiff's action basically asks this Court to first determine that the VIC Concession Agreement is subject to the SCA and, second, to grant Plaintiff certain relief in accordance with such determination.

I. APPLICABILITY OF SERVICE CONTRACT ACT

It is undisputed that the Secretary of Labor and NASA have always maintained that the SCA did not apply to the Concession Agreement. Additionally, it has been argued that even if a Concession Agreement was covered by the SCA, the Secretary of Labor, acting pursuant to his discretionary authority under § 4(b), 41 U.S.C. § 353 (b), has exempted concession contracts which provide services of indirect or remote benefit to the government from the SCA's coverage provisions. This exemption is found at 29 C.F.R. § 4.133.

In a Memorandum Opinion filed in this case on November 17, 1981, Senior Judge George C. Young found that the VIC Concession Agreement is covered by the SCA and that the exemption found in 19 C.F.R. § 4.133 had no application to the question presented by the facts in this case.

Subsequent to Judge Young's finding that the SCA was applicable, NASA applied for a wage determination from the Department of Labor (DOL) for the VIC Concession Agreement. In response, the DOL issued a wage determination effective from the date of the Memorandum Opinion.

II. RETROACTIVE RELIEF

A contract subject to the SCA must contain certain provisions. Among the provisions are those found in Sections 351(a)(1) and (2), calling for minimum wages and fringe benefits. This Court having determined that the VIC Concession Agreement is subject to the SCA, Plaintiff asks that the parties be compelled to retroactively satisfy the requirements of the SCA.

Had NASA and the Secretary of Labor initially treated the VIC Concession Agreement as being subject to the SCA, then the employees of TWAS, who were hired to perform the services at the VIC formerly performed by

ESI and BSI employees, would have received from TWAS[1] *at least* those wages and fringe benefits contained in wage determinations issued in 1978 for those ESI and BSI employees.[2] It is undisputed that TWAS paid their employees less than the wage determinations. Plaintiff seeks to recover the difference in wages and fringe benefits actually paid from those that would have been paid if the 1978 wage determinations had been made part of the VIC Concession Agreement. Plaintiff further seeks the difference in wage and fringe benefits actually paid and those that would have been paid had subsequent wage determinations been issued for the new VIC Concession Agreement entered into between NASA and TWAS in 1979.

In order to recover these differences, Plaintiff essentially asks the Court to compel NASA to request the appropriate wage determination, to compel the DOL to issue them, and to compel the agencies to enforce the wage determinations retroactively against TWAS. Alternatively, Plaintiff seeks to maintain a right of action directly against TWAS for the differences.

Addressing first the Plaintiff's right to maintain a private right of action against TWAS under the SCA,

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[1] For purposes of this Memorandum, the Court assumes that TWAS would have been treated as a successor contractor.

[2] In the process of awarding TWAS the Contract (Modification 9), NASA would have been required by 29 C.F.R. § 4.4 to submit the Contract to the DOL for a wage determination. Because TWAS would be a successor contractor, the provisions of Section 353(c) would come into operation. The parties disagree as to the applicability of that section to a contract succeeding one which was not subject to a collective bargaining agreement (such as ESI's contract with NASA). Because of the Court's disposition of this case, that issue need not be addressed. In any event, Section 353(c) would clearly require that the BSI wage determination be utilized and, assuming that the prevailing rates and fringe benefits for ESI's employees had not declined, the ESI wage determination *at the minimum* would have been utilized in any new wage determination for the award of the contract.

the Court notes that such a remedy has been found not to exist by several courts. *Miscellaneous Service Workers, etc. v. Philco Ford Corp.*, 661 F.2d. 776 (9th Cir. 1981); *Machinists v. Hodgson*, 515 F.2d 373 (D.C. Cir. 1975); *Nichols v. Mower's News Service*, 492 F.Supp. 258 (D.C. Vt. 1980); *Foster v. Parker Transfer Co.*, 528 F.Supp. 907 (D.C. W.D. Pa. 1981). The Fifth Circuit has recognized the issue, but has never addressed it. *Clark v. Unified Services*, 659 F.2d 49 (5th Cir. 1981).

Assuming, without deciding, that Plaintiff may maintain a private right of action against TWAS, the Court would none the less deny Plaintiff relief. TWAS was awarded the Contract (Modification 9) without a wage determination. The situation is strikingly similar to that in *Machinists v. Hodgson*, supra., where the court noted,

> "Under Section 3(a) (41 U.S.C. § 352[a]) the party responsible for the violation of a wage determination is liable for the amount of underpayment. In this case, however, there simply was no wage determination for the Boeing Company to violate, and the lack of such a wage determination should not be ascribed to Boeing." . . .
>
> "While the injury to the Union members may be the same as it would be where a wage determination is violated, the causation is not. The lack of a wage determination provision in the contract is not attributable to any action by Boeing. It is attributable only to the Secretary of Labor." *Id.* at 378.

Here, also, Plaintiff's injury flowed from the lack of a wage determination because of the Secretary of Labor's decision of the SCA's non-applicability. Whether a private right of action exists under the SCA or not, TWAS has simply not violated the SCA.[3]

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[3] The Court rejects Plaintiff's argument that TWAS was in violation of the SCA in spite of the lack of wage determination, because the successor provisions of Section 353(c) are self-

Remaining for determination is whether the Court can, or should, order the parties to retroactively comply with the SCA. Plaintiff urges that such action is necessary to make the TWAS employees whole for the injury suffered from their wrongful exclusion for the SCA's coverage.

Plaintiff correctly points out that in 1972 Congress removed from the Secretary of Labor *any discretion in issuing wage determinations for contracts subject to the SCA*. (Emphasis added) 41 U.S.C. § 358. The problem in this case is that the Secretary of Labor determined that the VIC Contract was not subject to the SCA. This Court, as noted, has ruled that the Secretary of Labor's decision was in error.

Since the Court has determined that the VIC Concession Agreement is subject to the SCA, Plaintiff argues that the Secretary of Labor and NASA have failed to comply with their mandatory duties, and mandamus lies to compel their performance.

Mandamus relief is provided for at 28 U.S.C. § 1361, as follows:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.

The remedy is an extraordinary one, which should be used in only the clearest and most compelling of cases. *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970). The right to mandamus

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executing. Absent an indication that the VIC Concession Agreement was considered by the DOL to be covered by the SCA in the first instance, it is asking too much for TWAS to comply with Section 353(c), whether or not it is self-executing in a situation of a clearly covered contract.

See also this Court's discussion on the equities involved in this case, *infra*.

must be shown to be clear and undisputable. *Kerr v. United States District Court*, 426 U.S. 394 (1975). Plaintiff must show that he had a clear right to the relief sought, that the duty on Defendants' part is clear, and that Plaintiff lacks another available remedy. *Carter v. Seamans*, supra.

In the present case, *subsequent* to this Court's holding that the SCA covers the VIC Concession Agreement, a decision not to issue prospective wage determinations would most likely entitle Plaintiff to mandamus relief. The Court cannot say the same is true for the issuance of retroactive wage determinations. It cannot be said that the Secretary of Labor, having been informed of his erroneous legal conclusion on the SCA's coverage, has a clear and undisputed duty to compel TWAS to pay for his mistake.

Plaintiff also seeks the same relief, retroactive compliance with the SCA, under the Administrative Procedures Act (APA), 5 U.S.C. § 701, et seq. Specifically, under Section 706(1) of that Act, Plaintiff asks the Court to compel agency action unlawfully withheld or unreasonably delayed. Assuming that the decision of non-coverage of the SCA resulted in agency action being "unlawfully" withheld, Plaintiff would have the Court issue a mandatory injunction, compelling the issuance of the retrospective wage determinations.

Issuance of injunctive relief rests upon equitable considerations. This Court is also of the view that it should act on equitable principals in fashioning its relief under the APA. The Court is not of the opinion that the equities in this case favor issuance of a mandatory injunction compelling issuance of retroactive wage determinations.

Issuance of retroactive wage determinations will result in no harm to the Secretary of Labor, but will greatly affect TWAS. As previously indicated, TWAS had every

right to rely upon the Contract (Modification 9) as presented, that is, without a wage determination. TWAS also had the right to rely upon the decision of NASA and the Secretary of Labor that the SCA did not cover the VIC Concession Agreement. It is undisputed that when TWAS took over the facility and landscape maintenance, there were no employees laid off from ESI and BSI. TWAS hired new employees to perform the additional services. Although Congress in fact intended that new employees such as these receive the benefit of prior wage determinations,[4] this case does not present the situation most disturbing to Congress; that is where the same employees, performing the same work, at the same place, are suddenly receiving lower wages and benefits under the new contract. In short, the equities do not dictate the relief sought by the Plaintiff.

In addition to the relief sought under the SCA, Plaintiff has stated a right of action against TWAS under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, for alleged violations of certain collective bargaining agreements. Plaintiff maintains that TWAS agreed that if this Court found the SCA applicable to the VIC Agreements, then TWAS would adjust the wage rates retroactively. TWAS denied the existance of such an agreement. Upon hearing and review of the evidence, the Court finds that Plaintiff has failed to prove that such an agreement existed.

Finally, Plaintiff argues that whether or not NASA and the Secretary of Labor had treated the VIC Agreement as covered by the SCA, TWAS was charged with knowledge of such coverage as a matter of law. Therefore, Plaintiff argues, TWAS was bound by 41 U.S.C.

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[4] By mandating that even new employees are covered by the previous wage determination, Congress eliminated the situation where former employees would not be rehired in order to circumvent the SCA. That is not the case here; the former ESI and BSI employees retained their positions.

§ 353(c) to pay no less wages and fringe benefits than its predecessors, ESI and BSI, because that section is self-executing. As previously indicated, in footnote 3, regardless of whether that section is in fact self-executing, TWAS could only be required to satisfy that section's requirements if it had knowledge that the SCA was applicable. It seems to this Court to be an absurd proposition to charge one with knowledge of SCA coverage by operation of law, when those whose job it is to enforce the law have stated otherwise. Such is the case here and the Court refuses to hold TWAS to such a magnanimous position. Again, Plaintiff's injury stems from the acts of the Secretary of Labor, not from TWAS.

Based on the foregoing, judgment shall be entered in favor of Plaintiff to the extent that the Court declares the SCA covers the VIC Concession Agreement, and against Plaintiff and in favor of Defendants for the additional substantive relief sought by Plaintiff. The Court will reserve ruling on the issue of attorneys' fees and costs.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of September, 1982.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-Orl-Civ-Y

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

[Filed Sep. 24, 1982]

JUDGMENT

In accordance with the Memorandum Opinion filed this date in the cause, it is

ORDERED and ADJUDGED that judgment is hereby entered in favor of Plaintiff and against Defendants to the extent that the Court declares the Service Contract of 1965, as amended, 41 U.S.C. § 351, *et. seq.*, to cover the Visitor Information Center Concession Agreement at Kennedy Space Center; it is further

ORDERED and ADJUDGED that judgment be and is hereby entered in favor of Defendants and against Plaintiff for the additional substantive relief sought by Plaintiff; it is further

ORDERED and ADJUDGED that the Court retain jurisdiction of this cause for ruling on the issue of attorneys' fees and costs.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of September, 1982.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-ORL-CV-EK

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

v.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that District Lodge No. 166, International Association of Machinists and Aerospace Workers, AFL-CIO, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on the 24th day of September, 1982, by Judge Kovachevich in the District Court for the Middle District of Florida, Orlando Division.

/s/ Mozart G. Ratner
MOZART G. RATNER

MOZART G. RATNER, P.C.
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/s/ Joseph P. Manners
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Suite 106
Miami, Florida 33166
Counsel for Plaintiff

Dated Nov. 10, 1982

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-Orl-Civ-EK

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

[Filed Dec. 1, 1982]

ORDER AND NOTICE OF HEARING

This cause is before the Court on the plaintiff's motion for leave to defer application for fees and other expenses pending appeal, and on the similar motion filed by defendant, TWA Services, Inc. As the parties are aware, the undersigned judge is scheduled to be transferred to another division of this Court and desires to rule on the subject of attorneys' fees and costs prior to such transfer. Accordingly, it is

ORDERED that the motions are hereby denied; it is further

ORDERED that all parties to this action desiring to move for an award of attorneys' fees and costs shall file such motions, along with supporting memorandums and affidavits, no later than December 31, 1982; all parties opposing such motions shall file their responses no later than January 14, 1983; it is further

ORDERED that a hearing on the motions shall be set for 2:00 p.m. in Courtroom #1, on January 31, 1983, before the Honorable Elizabeth A. Kovachevich, United States District Judge, Federal Building, 80 North Hughey Avenue, Orlando, Florida.

DONE and ORDERED in Chambers at Orlando, Florida this 1st day of December, 1982.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 79-405-Orl-Civ-EK

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

vs.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

ORDER

By this Court's Order dated and filed December 1, 1982, and furnished to all counsel of record, it was Ordered "that all parties to this action desiring to move for an award of attorneys' fees and costs shall file such motions along with supporting memorandum and affidavits, no later than December 31, 1982; all parties opposing such motions shall file their responses no later than January 14, 1983." The aforesaid Order further scheduled a hearing on the Motion for 2:00 p.m., January 31, 1983, Federal Building, 80 North Hughey Avenue, Orlando, Florida.

On Monday, January 31, 1983, this Court convened pursuant to its prior Order, the only attorney appearing was Government counsel. This Court attempted to schedule a hearing convenient to the parties so that the issue of attorney fees could be resolved. The disregard, by Mozart G. Ratner, counsel for the plaintiff and James M. Blue, counsel for defendant TWA Services Inc., to

comply with the previous order of this Court, dated December 1, 1982, is considered by this Court to be a waiver of their respective claims for attorney fees and as such does not preserve their claim for attorneys' fees post appeal in this cause.

It is hereby ORDERED and ADJUDGED:

(1) That any claim by, for or in behalf of Mozart G. Ratner for attorney fees is denied.

(2) That any claim by, for or in behalf of James M. Blue for attorney fees is denied.

DONE and ORDERED this 3rd day of February, 1983 at Orlando, Florida.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

SERVICE CONTRACT LABOR STANDARDS

Pub.L. 89-286, Oct. 22, 1965, 79 Stat. 1034, as amended

Title 41, U.S.C.A., §§ 351 to 358

Sec.

§ 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by

making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of Title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b) (1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206 (a) (1) of Title 29.

(2) The provisions of sections 352 to 354 of this title shall be applicable to violations of this subsection.

§ 352. Violations

Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

(a) Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351 (b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

Enforcement of section

(b) In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

§ 353. Law governing Secretary's authority; limitations and regulations allowing variations, tolerances and exemptions; predecessor contracts, applicability; duration of contracts.

(a) Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropiate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

§ 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court

of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recoved by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

§ 355. Exclusion of fringe benefit payments in determining overtime pay

In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act [1] by provisions of section 207(d) of Title 29.

§ 356. Exemptions

This chapter shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act [1];

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

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[1] See 29 U.S.C.A. § 201 et seq.

[1] See 41 U.S.C.A. §§ 35 to 45.

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934[2];

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

§ 357. Definitions

For the purposes of this chapter—

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subtractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 351 of this title.

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[2] See 47 U.S.C.A. § 151 et seq.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act,[1] American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajaleim Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

§ 358. Wage and fringe benefit determinations of Secretary

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 351 of this title[1] should be made with respect to all contracts subject to this chapter, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this chapter which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than tweny-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

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[1] See 43 U.S.C.A. § 1331 et seq.

[1] So in original. Probably should be "paragraphs (1) and (2) of subsection (a) of section 351 of this title".

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

29 U.S.C. § 185

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. § 1331

§ 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361

§ 1361 Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

5 U.S.C. § 706

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * *

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

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HOUSE OF REPRESENTATIVES

92D CONGRESS
2d Session

REPORT
No. 92-1251

AMENDMENTS TO THE SERVICE CONTRACT ACT OF 1965

JULY 27, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. PERKINS, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H.R. 15376]

The Committee on Education and Labor, to whom was referred the bill (H.R. 15376) to amend the Service Contract Act of 1965 to revise the method of computing wage rates under such act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) section 2(a)(1) of the Service Contract Act of 1965 is amended by striking out all after "locality," and inserting in lieu thereof the following: "or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including, if the Secretary so elects, prospective wage increases provided for in such agreement as a result of arm's-length negoti-

ations. In no case shall such wages be lower than the minimum specified in subsection (b)".

(b) Section 2(a)(2) of such Act is amended by striking out the period after "locality" and inserting in lieu thereof the following: ", or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including, if the Secretary so elects, prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations."

SEC. 2. Section 2(a) of such Act is amended by adding at the end thereof the following new paragraph:

> "(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section."

SEC. 3. (a) Section 4(b) of such Act is amended by striking out all after "Act" and inserting in lieu thereof the following: ("other than section 10), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards."

(b) Section 4 of such Act is amended by adding at the end thereof the following new subsections:

"(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than

the wages and fringe benefits, including accrued wages and fringe benefits, and, if the Secretary so elects, any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employee would have been entitled if he were employed under the precedessor contract.

"(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees."

SEC. 4. Section 5(a) of such Act is amended by inserting before the first comma of the second sentence the words "because of unusual circumstances" and by adding at the end of such section 5(a) the following: "Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than thirty days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act."

SEC. 5. Such Act is amended by adding at the end thereof the following new section:

"SEC. 10. It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with

respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

"(1) For the fiscal year ending June 30, 1973, all contracts under which more than tweny-five service employees are to be employed.

"(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

"(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

"(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

"(5) For the fiscal year ending June 30, 1977, all contracts under which more than five service employees are to be employed.

"(6) For the fiscal year ending June 30, 1978, and for each fiscal year thereafter, all contracts subject to this Act."

PURPOSE OF H.R. 15376 AS AMENDED

H.R. 15376 as amended makes a number of changes in the Service Contract Act which are designed to bring about more equitable and more efficient administration of the act and to provide for wage and fringe benefit determinations for all contracts subject to the act in stages over a period of 6 years.

The bill is the result of 9 days of oversight hearings by the Special Subcommittee on Labor into the administration of the act, during which the subcommittee made an extensive review of every aspect of Government service contracting and the degree to which the wage stand-

ards of service employees under those contracts were being protected by the Service Contract Act.

The committee discovered a number of serious problems during the course of the hearings, and believes that these amendments will help to strengthen the Department of Labor's ability to administer this act as the sponsors of the Service Contract Act originally intended.

Legislative History of H.R. 15376 as Amended

The Special Subcommittee on Labor, Chaired by Representative Frank Thompson, Jr., conducted oversight hearings on the administration of the Service Contract Act of 1965 in Washington, D.C., on March 30, April 1, 2, and 6, May 5, October 12, 13, and 14, 1971, and on June 1, 1972.

As a result of these oversight hearings, H.R. 15376 was introduced by Representative Thompson on June 7, 1972.

H.R. 15376 was favorably reported by the subcommittee to the Committee on Education and Labor on June 29, 1972.

H.R. 15376 was considered at a session of the Committee on Education and Labor on July 18 and unanimously ordered reported.

Background and Need for Legislation

The Service Contract Act was enacted in 1965 to provide wage and safety protections for employees working under Government service contracts. The act provides that employees must be paid at least the prevailing wages and fringe benefits for the same work in their locality, and protected from unsafe working conditions.

Under the impetus of the Legislative Reorganization Act of 1970, which emphasized the responsibility of committees to conduct legislative oversight, the Special Sub-

committee on Labor conducted 9 days of oversight hearings on the administration of the act during the 92d Congress.

The subcommittee discovered a number of serious problems, which are detailed in the hearing record and in a committee print entitled "The Plight of Service Workers Under Government Contracts." Among them were these:

(1) The Department has failed to make wage and fringe benefit determinations for almost two-thirds of the contracts subject to the act;

(2) A substantial disparity in wages and fringe benefits has developed between Federal wage board employees and their counterparts employed by service contractors;

(3) A great deal of labor-management instability has arisen because of a failure to take the existence of collective bargining agreements into account in the wage and fringe benefit determination process;

(4) A section of the act giving the Secretary of Labor discretion in administering the act has been stretched far beyond what the Congress had intended;

(5) The practice of rebidding contracts yearly either without wage and fringe determinations or with unrealistically low determinations is creating chaos for reputable contracts and great hardships for employees.

The Committee has addressed each of the problems in H.R. 15376 as amended.

Section-by-Section Analysis

Section 1

Subsection (a) of this section amends the first paragraph of section 2(a) (pertaining to required contract

provisions) of the Service Contract Act of 1965 by providing that, in cases where a collective bargaining agreement covers the service employees, the minimum monetary wages to be paid the various classes of such employees shall be in accordance with the rates provided for in the collective bargaining agreement, and that the minimum monetary wages may include prospective wage increases provided for in the collective bargaining agreement if the Secretary of Labor elects and if they were the result of arm's-length negotiations. The amendment made by this subsection does not change the existing standard (prevailing rates in the locality) for minimum monetary wages in cases where the service employees are not covered by a collective bargaining agreement, and it continues the existing requirement that in no case shall the minimum monetary wages be lower than the Federal minimum wage.

Subsection (b) of this section amends the second paragraph of section 2(a) of the Service Contract Act by providing that, in cases where a collective bargaining agreement covers the service employees, the fringe benefits to be furnished the various classes of such employees shall be those provided for in the collective bargaining agreement, and that the fringe benefits may include prospective fringe benefit increases provided for in the collective bargaining agreement if the Secretary elects and if they were the result of arm's-length negotiations. The amendment made by this subsection does not change the existing standard (prevailing fringe benefits in the locality) for fringe benefits in cases where the service employees are not covered by a collective bargaining agreement. Other provisions of existing law, pertaining to which categories of benefits may be considered to be fringe benefits, and to the furnishing of equivalent combinations of fringe benefits and the making of payments in cash, remain unchanged by the amendment made by this subsection.

Section 2

This section adds to the required contract provisions specified in section 2(a) of the Service Contract Act a requirement that the contract contain a statement of the rates which would be paid to the various classes of service employees under section 5341 (which fixes the rates of pay of Federal agency employees in the trades and crafts) of title 5, United States Code, if such section were applicable to them. This section also directs the Secretary to give due consideration to such rates of pay in determining minimum monetary wages and fringe benefits.

Section 3

Subsection (a) of this section amends section 4(b) of the Service Contract Act. It limits the Secretary's discretion under the authority given to him under section 4(b) to allow reasonable limitations, variations, tolerances, and exemptions to and from the provisions of the Service Contract Act, by providing that such authority is to be exercised only in special circumstances. In addition to the limitation of existing law that the Secretary may exercise such authority where it is necessary and proper in the public interest or to avoid the impairment of government business, this subsection requires that the Secretary also determine that the limitation, variation, tolerance, or exemption is in accord with the remedial purpose of the Service Contract Act.

Subsection (b) of this section adds two new subsections at the end of section 4 of the Service Contract Act.

New subsection (c) deals with contracts, under which substantially the same services are furnished, which succeed contracts subject to the Service Contract Act. Contractors or subcontractors under such contracts must pay service employees at least the wages and fringe benefits (including accrued wages and fringe benefits) to which

the service employees would have been entitled had they been employed under the predecessor contract, as well as any prospective wage and fringe benefit increases provided for in a collective bargaining agreement to which they would have been entitled had they been so employed, if the Secretary elects, and if such prospective increases were the result of arm's-length negotiations.

New subsection (d) permits the Secretary to authorize service contracts for terms of up to 5 years (subject to limitations in annual appropriation acts) if such contract provides for an adjustment of the minimum monetary wages and fringe benefits, in the manner prescribed in section 2 of the Service Contract Act, at least every two years.

Section 4

This section amends section 5(a) (pertaining to the list containing the names of violators of the Service Contract Act to be distributed among all the agencies of the Federal Government) of the Service Contract Act. The amendment made by this section limits the Secretary's discretion to relieve violators of the Service Contract Act from the debarment provisions of section 5(a) to cases where unusual circumstances exist. It imposes upon the Secretary the duty, where he does not otherwise recommend because of unusual circumstances, to forward to the Comptroller General the name of the individual or firm found to have violated the provisions of the act, within 30 days after a hearing examiner has made a finding of violation.

Section 5

This section adds a new section at the end of the Service Contract Act, covering determinations by the Secretary of minimum monetary wages and fringe benefits with respect to contracts subject to such act. This new

section 10 expresses the intent of Congress that such determinations be made with respect to all such service contracts as soon as is administratively feasible, and directs the Secretary to make such determinations with respect to all such contracts under which certain specified numbers of service employees are employed during the next 5 fiscal years, and with respect to all contracts subject to such act during the fiscal year ending June 30, 1978, and during each fiscal year thereafter.

COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the House of Representatives, the committee estimates that the cost of administering the Service Contract Act of 1965, as amended, will increase gradually during this and the next 5 succeeding fiscal years as the Department achieves full coverage of contracts subject to the act. The committee is unable to arrive at a specific dollar figure for these additional administrative costs because of uncertainties over the best techniques for making wage and fringe benefit determinations. The committee has provided for a 6-year period in which to achieve full coverage in order to avoid overburdening the Department initially, and urges the Department to experiment with more efficient techniques in making wage and fringe benefit determinations.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SERVICE CONTRACT ACT OF 1965

AN ACT To provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Service Contract Act of 1965".

SEC. 2. (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, as defined herein, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, [which in no case shall be lower than the minimum specified in subsection (b)] *or, where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including, if the Secretary so elects, prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).*

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be pre-

vailing for such employees in the locality *or, where a collective bargaining agreement covers any such service employees, to be provided for in such agreement, including, if the Secretary so elects, prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations.* Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b) (1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees as defined herein and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060:29 U.S.C. 201, et seq.).

(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2(a)(1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or

the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangement for the completion of the original contract, charging any additional cost to the original contractor.

SEC. 4. (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended, shall govern the Secretary's authority to enforce this Act, makes rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act [as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business] *(other than section 10), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.*

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and, if the Secretary so elects, any prospective increases in wages and fringe benefits provided for in a collective bargaining agreement as a re-

sult of arm's-length negotiations, to which such service employee would have been entitled if he were employed under the predecessor contract.

(d) Subject to limitations in annual appropriation Acts, but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees.

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends *because of unusual circumstances,* no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. *Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than thirty days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act.*

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of

underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

SEC. 7. This Act shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

SEC. 8. For the purpose of this Act—

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

SEC. 9. This Act shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act.

Sec. 10. It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the

provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fisal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) For the fiscal year ending June 30, 1977, all contracts under which more than five service employees are to be employed.

(6) For the fiscal year ending June 30, 1978, and for each fiscal year thereafter, all contracts subject to this Act.

LEGISLATIVE HISTORY

P.L. 82-473

SERVICE CONTRACT ACT—AMENDMENT

P.L. 92-473, see page 916

House Report (Education and Labor Committee)
No. 92-1251, July 27, 1972 [To accompany H.R. 15376]

Senate Report (Labor and Public Welfare Committee)
No. 92-1131, Sept. 15, 1972 [To accompany H.R. 15376]

Cong. Record Vol. 118 (1972)

DATES ON CONSIDERATION AND PASSAGE

House August 7, September 27, 1972

Senate September 19, 1972

The Senate Report is set out.

SENATE REPORT NO. 92-1131

THE Committee on Labor and Public Welfare, to which was referred the bill (H.R. 15376) to amend the Service Contract Act of 1965 to revise the method of computing wage rates under such Act, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SUMMARY

The Service Contract Act was enacted to provide wage and safety protection for employees working under Government service contracts. It makes the Department of Labor responsible for assuring that service employees are paid at least the prevailing wages and fringe benefits for the same work in their locality as others are paid, so that this is simply a wage standards protection statute.

The purpose of this bill is to bring about more equitable and more efficient administration of the Service Contract Act of 1965.

The bill:

1. Provides assurance that employees working for service contractors under a collective bargaining agreement will have wages and fringe benefits under a new service contract no lower than those under their current agreement;

2. Requires the Secretary of Labor to take into account in determining the prevailing rate, wage and fringe benefit increases provided for by prospective increases in collective bargaining agreements;

3. Requires the Secretary of Labor to consider wage board rates in determining the rates for service contract employees;

4. Ordinarily requires successor contractors to pay service employees wages and fringe benefits that are no lower than their wages and fringe benefits under the current contract;

5. Mandates that the Secretary of Labor issue wage determinations for all government service contracts under which more than five employees are employed; and

6. Strengthens the procedures for the debarment of contractors who have been found to have violated the act.

COMMITTEE CONSIDERATION OF LEGISLATION

The House passed H.R. 15376 on August 7, 1972. On July 21, 1972, Senator Edward J. Gurney with the cosponsorship of Senator Harrison A. Williams, Jr., introduced an identical bill (S. 3827) in the Senate. The Subcommittee on Labor held two days of hearings on August 16, 1972 and September 6, 1972, receiving testi-

mony from Senator Gurney, representatives of labor, management and government.

On September 8, 1972 the Subcommittee on Labor reported the bill to the Full Committee which after two days of deliberation, unanimously ordered the bill reported favorably to the Senate, on September 15, 1972.

Section-by-Section Analysis

Section 1

Subsection (a) of this section amends the first paragraph of section 2(a) (pertaining to required contract provisions) of the Service Contract Act of 1965 by providing that, in cases where a collective bargaining agreement covers the service employees, the minimum monetary wages to be paid the various classes of such employees shall be in accordance with the rates provided for in the collective bargaining agreement, and that the minimum monetary wages include prospective wage increases provided for in the collective bargaining agreement if they were the result of arm's-length negotiations. The amendment made by this subsection does not change the existing standard (prevailing rates in the locality) for minimum monetary wages in cases where the service employees are not covered by a collective bargaining agreement, and it continues the existing requirement that in no case shall the minimum monetary wages be lower than the Federal minimum wage.

Subsection (b) of this section amends the second paragraph of section 2(a) of the Service Contract Act by providing that, in cases where a collective bargaining agreement covers the service employees, the fringe benefits to be furnished the various classes of such employees shall be those provided for in the collective bargaining agreement, and that the fringe benefits include prospective fringe benefit increases provided for in the collective bargaining agreement if they were the result of arm's-

length negotiations. The amendment made by this subsection does not change the existing standard (prevailing fringe benefits in the locality) for fringe benefits in cases where the service employees are not covered by a collective bargaining agreement. Other provisions of existing law, pertaining to which categories of benefits may be considered to be fringe benefits, and to the furnishing of equivalent combinations of fringe benefits and the making of payments in cash, remain unchanged by the amendment made by this subsection.

Section 2

This section adds to the required contract provisions specified in section 2(a) of the Service Contract Act a requirement that the contract contain a statement of the rates which would be paid to the various classes of service employees under section 5341 (which fixes the rates of pay of Federal agency employees in the trades and crafts) of title 5, United States Code, if such section were applicable to them. This section also directs the Secretary to give due consideration to such rates of pay in determining minimum monetary wages and fringe benefits.

Section 3

Subsection (a) of this section amends section 4(b) of the Service Contract Act. It limits the Secretary's discretion under the authority given to him under section 4(b) to allow reasonable limitations, variations, tolerances, and exemptions to and from the provisions of the Services Contract Act, by providing that such authority is to be exercised only in special circumstances. In addition to the limitation of existing law that the Secretary may exercise such authority where it is necessary and proper in the public interest or to avoid the impairment of government business, this subsection requires that the Secretary also determine that the limitation, variation, tolerance, or exemption is in accord with the remedial purpose of the Service Contract Act.

Subsection (b) of this section adds two new subsections at the end of section 4 of the Service Contract Act.

New subsection (c) deals with contracts, under which substantially the same services are furnished, which succeed contracts subject to the Service Contract Act. Contractors or subcontractors under such contracts must pay service employees at least the wages and fringe benefits (including accrued wages and fringe benefits) to which the service employees would have been entitled had they been employed under the predecessor contract, as well as any prospective wage and fringe benefit increases provided for in a collective bargaining agreement to which they would have been entitled had they been so employed if such prospective increases were the result of arm's-length negotiations.

In addition, subsection (c) contains a proviso that the provisions of this subsection and sections 2(a)(1) and 2(a)(2) will not apply if the Secretary finds after a hearing that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

New subsection (d) permits the Secretary to authorize service contracts for terms of up to 5 years (subject to limitations in annual appropriation acts) if each such contract provides for an adjustment of the minimum monetary wages and fringe benefits, in the manner prescribed in section 2 of the Service Contract Act, at least every 2 years.

Section 4

This section amends section 5(a) (pertaining to the list containing the names of violators of the Service Contract Act to be distributed among all the agencies of the Federal Government) of the Service Contract Act. The amendment made by this section limits the Secretary's discretion to relieve violators of the Service Contract Act

from the debarment provisions of section 5(a) to cases where unusual circumstances exist. It imposes upon the Secretary the duty, where he does not otherwise recommend because of unusual circumstances, to forward to the Comptroller General the name of the individual or firm found to have violated the provisions of the act, within 90 days after a hearing examiner has made a finding of violation.

Section 5

This section adds a new section at the end of the Service Contract Act, covering determinations by the Secretary of minimum monetary wages and fringe benefits with respect to contracts subject to such act. This new section 10 expresses the intent of Congress that such determinations be made with respect to all such service contracts as soon as is administratively feasible, and directs the Secretary to make determinations in accordance with the statutorily prescribed schedule.

Section 2(a)(1) and 2(a)(2) of the act have been amended, and a new subsection (c) has been added to section (4) *to explicate the degree of recognition to be accorded collective bargaining agreements covering service employees, in the predetermination of prevailing wage and fringe benefits for future such contracts* for *services* at the *same* location. (Emphasis added except for "services" and "same," emphasized in original).

Section 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme. It is the intention of the committee that sections 2(a)(1) and 2(a)(2) and 4(c) be so construed that the proviso in section 4(c) applies equally to all the above provisions. The committee appreciates the importance of decasualizing the service contract industry—a labor intensive and otherwise casual and transient industry. The bill seeks to provide a measure of stability and dignity to service contract employees, while at the same time building unnecessary safe-

guards to protect the public interest against any possible abuse.

Ordinarily, where service employees are covered by a collective bargaining agreement, a successor contractor furnishing substantially the same services at the same location, will be obligated to pay to such service employees no less than wages and fringe benefits required by such agreement. This requirement would likewise apply to prospective wages and fringe benefits.

The term "accrued . . . fringe benefits" is interpreted to mean those benefits, such as accrued vacation pay or sick leave, to which an employee has become entitled by virtue of employment on predecessor contracts.

This provision should not be construed to confer windfall benefits.

However, the committee was concerned about safeguarding against any possible abuse. There are certain unusual circumstances where predetermination of wages and fringe benefits contained in such a collective agreement might not be in the best interest of the worker or the public.

Thus, service employees should be protected against instances where the parties may not negotiate at arms length. For example, a union and an employer may enter into a contract, calling for wages and fringe benefits substantially lower than the rates presently prevailing for similar services in the locality. Likewise, a union and employer may reach an agreement providing for future increases substantially in excess of any justifiable increases in the industry. Finally, it is possible that over a long period of time, predetermined contractual rates might become substantially at variance with those actually prevailing for services of a character similar in the locality.

The committee concluded that the dual objectives of protecting the service worker and safeguarding other

legitimate interests of the federal government could be best achieved by requiring the Secretary to predetermine the wages and fringe benefits contained in the collective agreement, except in the instance where he finds, after notice to interested parties, and a hearing, that the record discloses by a clear showing that such contractual wages and fringe benefits are substantially at variance with those prevailing for services of a character similar in the locality.

It is the sense of the committee that the Secretary should draft regulations providing for expeditious hearings and decisions. Clearly, contractual wages and fringe benefits shall continue to be honored in the foregoing circumstances, unless and until the Secretary finds, after hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services.

It is the intent of the committee that no contractor be foreclosed as a result of these procedures from submitting a contract proposal.

Cost Estimate

The committee estimates that the cost of administering the Service Contract Act of 1965, as amended, will increase gradually during this and the next 5 succeeding fiscal years as the Department approves full coverage of contracts subject to the act. The committee is unable to arrive at a specific dollar figure for these additional administrative costs because of uncertainties over the best techniques for making wage and fringe benefit determinations. The committee urges the Department to experiment with more efficient techniques in making wage and fringe benefit determinations.

Tabulation of Votes in Committee

Pursuant to section 113(b of the Legislative Reorganization Act of 1946 as amended by the tabulation of the

votes in the Committee of Labor and Public Welfare is as follows:

1. Senator Taft's motion to substitute section 1 of the bill to give the Secretary at his election, explicit statutory authority to include prospectively bargained wage and fringe benefit increases in Service Contract Act determinations (defeated 3 to 9).

YEAS	NAYS
Mr. Dominick	Mr. Randolph
Mr. Packwood	Mr. Pell
Mr. Taft	Mr. Nelson
	Mr. Mondale
	Mr. Stevenson
	Mr. Javits
	Mr. Schweiker
	Mr. Stafford
	Mr. Williams

Senator Taft's motion to amend section 3(b) to establish a presumption that the successor contractor must pay at least as much as the predecessor, provided that such compensation is not substantially higher than prevailing in the locality for similar work (defeated 3 to 10).

YEAS	NAYS
Mr. Dominick	Mr. Randolph
Mr. Packwood	Mr. Pell
Mr. Taft	Mr. Nelson
	Mr. Mondale
	Mr. Eagleton
	Mr. Hughes
	Mr. Stevenson
	Mr. Javits
	Mr. Schweiker
	Mr. Williams

SERVICE CONTRACT ACT AMENDMENTS, 118 Cong. Rec. 27136-27142 (Aug. 7, 1972)

Mr. THOMPSON of New Jersey. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 15376) to amend the Service Contract Act of 1965 to revise the method of computing wage rates under such act, and for other purposes, as amended.

The Clerk read as follows:

H.R. 15376

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 2(a)(1) of the Service Contract Act of 1965 is amended by striking out all after "locality," and inserting in lieu thereof the following: "or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates of such employees provided for in such agreement, including, if the Secretary so elects, prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b)".

(b) Section 2(a)(2) of such Act is amended by striking out the period after "locality" and inserting in lieu thereof the following: ", or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including, if the Secretary so elects, prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations."

SEC. 2. Section 2(a) of such Act is amended by adding at the end thereof the following new paragraph:

"(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees of section 5341 of title 5, United States Code, were applicable to them. The Secretary shall give due

consideration to such rates in making the wage and fringe benefit determinations specified in this section."

SEC. 3. (a) Section 4(b) of such Act is amended by striking out all after "Act" and inserting in lieu thereof the following: "(other than section 10), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards."

(b) Section 4 of such Act is amended by adding at the end thereof the following new subsections:

"(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and, if the Secretary so elects, any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employee would have been entitled if he were employed under the predecessor contract.

"(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary, be for any term of years and exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees."

SEC. 4. Section 5(a) of such Act is amended by inserting before the first comma of the second sentence the

words "because of unusual circumstances" and by adding at the end of such section 5(a) the following: "Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than thirty days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act."

SEC. 5. Such Act is amended by adding at the end thereof the following new section:

"SEC. 10. It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

"(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five employees are to be employed.

"(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

"(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

"(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

"(5) For the fiscal year ending June 30, 1977, all contracts under which more than five service employees are to be employed.

"(6) For the fiscal year ending June 30, 1978, and for each fiscal year thereafter, all contracts subject to this Act."

The SPEAKER. Is a second demanded?

Mr. ASHBROOK. Mr. Speaker, I demand a second.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

Mr. THOMPSON of New Jersey. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 15376, a bill to amend the Service Contract Act of 1965. *This bill was reported out unanimously by the Committee on Education and Labor and is a product of intensive bipartisan study and investigation.* (Emphasis added throughout)

The Special Subcommittee on Labor, which I have the privilege to chair, conducted 9 days of legislative oversight hearings during this Congress on the administration of the Service Contract Act. We heard testimony from administration officials, representatives of organized labor, representatives of the service industry, and some service workers themselves. We undertook these hearings under the impetus of the Legislative Reorganization Act of 1970, which called upon legislative committees to intensify their oversight activities.

The Service Contract Act was enacted to provide wage and safety protections for employees working under Government service contracts. It makes the Department of Labor responsible for assuring that service employees are paid at least the prevailing wages and fringe benefits for the same work in their locality as others are paid, so that this is simply a wage standards protection statute.

The hearings and our subsequent markup sessions were conducted in a completely bipartisan fashion. Each member of the subcommittee and the full committee was intent on finding out whether there were any problems in the

administration of this act and what we in the Congress could do to correct any deficiencies we discovered. There were five serious problems which became apparent during the course of the hearings.

First. *The Department has failed to make wage and fringe benefit determinations for almost two-thirds of the contracts subject to the act*;

Second. A substantial disparity in wages and fringe benefits has developed between Federal wage board employees and their counterparts employed by service contractors;

Third. A great deal of labor-management instability has arisen because of a failure to take the existence of collective-bargaining agreements into account in the wage and fringe benefit determination process;

Fourth. *A section of the act giving the Secretary of Labor discretion in administering the act has been stretched far beyond what the Congress had intended*;

Fifth. The practice of rebidding contracts yearly either without wage and fringe determinations or with unrealistically low determinatons s creatng chaos for reputable contractors and great hardships for employees.

We have addressed each one of these problems in H.R. 15376. In effect, what we have done is to strengthen the hand of the Secretary of Labor in assuring that full coverage of all contracts subject to this act is eventually achieved. We have given the Secretary 6 years to gradually acheve full coverage, beginning *by mandating full coverage during fiscal year 1963 of all contracts subject to the act* which propose to employ more than 25 employees, and *achieving full* [27137] *coverage of all contracts subject to the act by fiscal year 1978.* We believe that this is a fair and equitable mechanism for allowing the Department to gradually evolve the best technique for making wage and fringe benefit determinations at the lowest possible cost to the taxpayer. There are a number of other technical and clarifying amendments to the act

which are explained at some length in the report accompanying H.R. 15376.

I think this is an excellent bill, and I want to especially commend the ranking Republican on the subcommittee, Mr. ASHROOK, of Ohio, for his complete cooperation during our investigation. I also wish to commend the ranking member of the Full Committee on Education and Labor. Mr. QUIE, of Minnesota, for his cooperation and support in our efforts to fashion a legislative vehicle to remedy the problems we found in the operation of the act.

I also wish to commend my colleague, Mr. O'HARA of Michigan, a member of the subcommittee and the author of the Service Contract Act of 1965 in the House, for the diligent manner in which he has pursued the problems that have arisen under the act since it was first passed.

I think we have an excellent bill here, and it is a bipartisan bill which will not only protect service employees, but give reputable service contractors a fairer set of ground rules under which to operate. I urge my colleagues to support this bill.

Mr. ASHBROOK. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I was present at all of the hearings on this bill. I could echo many of the things that the gentleman from New Jersey just said. But I would like to call your attention to the statement in part II of the hearings on page 24 by our former colleague and now senior Senator from Florida.

The thing that is most unfortunate about the way the law is carried out and interpreted by the Department of Labor at present is that employees continually in bases throughout the country, particularly military bases, find themselves pawns in a contract struggle.

I will read to you what Mr. GURNEY indicated happened in Florida, as an example, and I quote him directly:

As you will notice, I represented the Cape Kennedy area as a Congressman, and it is now part of my constituency as a Senator.

I hope everybody will listen to this very closely because this is the very heart of the bill.

To continue:

Last year we had a rebidding of a NASA service contract. The only material thing bid was wages; and able, loyal workers found themselves earning, a day after the contract was awarded, one-quarter, one-third, even as high as 50-percent less than before, doing precisely the same job the day before.

Now we have another service contract out for bid at Patrick Air Force Base. This is the service contract now held by Pan American and RCA, and exactly the same thing will happen in this case. Only wages will be bid, and the worker's pay and his ability to feed and clothe and house his family is now out on the auction block. I firmly believe that an average wage should be determined by the Labor Department, after a thorough wage study today in these service contract cases, a wage below which a bidder may not go, and I have requested the Labor Department to do this.

In fact, I have requested it twice. The request was denied the first time, and I have not heard from the second request as yet. I certainly hope that your committee will help in drafting legislation to accomplish this goal in this service contract area.

This is precisely what we are talking about. It makes no sense in equity and it certainly is bad policy to allow contract bidders to come into these areas to underbid and then give a take-it-or-leave-it basis to the employee who is doing vital work for our country.

I support this on the basis of equity. *I support it because I do not believe the Department of Labor has issued the determinations that they should, and has not determined, as Mr. Gurney pointed out, wages below which a bidder may not go.*

This, supposedly, should be the law. But bidders can come in and they can as we saw in our hearings, if you

study our hearings, particularly through the Southwest, go from one base to another and have a contract 1 year—and then go in and underbid—and possibly make some money. Maybe that is free enterprise, but the result is to squeeze the employee and pay him less for the same thing that he was doing in the previous year—and then go to another base next year. I think it is completely wrong.

Supposedly, the Department of Labor should protect these employees. But I would say to the Members of this House, the Department of Labor is not doing this. So I support this bill wholeheartedly on the basis of equity.

This bill merely requires that a successful bidder cannot pay less to employees than they were receiving from their former employer pursuant to a contract with respect to wage and fringe benefits. That certainly does not seem to be radical to me.

It has been indicated that prospective wage increases will be included in wage determinations. The committee saw this as a possible pitfall. Every member of our committee recognizes you can have a situation where bids of contracts going into the future would be very high and there would be no way of bringing them under control. That is why the bill specifically gives the Secretary of Labor—and, if you will look at pages 5 and 6, we have added this language—"* * * if the Secretary so elects" the Secretary of Labor may choose to include any prospective wage increases in his determination.

Certainly, I cannot foresee on the basis of their handling up to now, that they would agree to any exhorbitant increase.

I happen to feel, in all equity, that this bill is long past due. Many employees have been taken advantage of.

The other thrust of the bill is to require the Secretary of Labor to increase the number of wage determinations yearly until at the end of a 6-year period, wage determinations must be made where any Government contract is

awarded subject to the Service Contract Act. *That is all we are doing, these two major items, making sure that an employee cannot be reduced—you cannot have bidding which would reduce their wages and make the Secretary of Labor by statute increase the number of wage determinations until all wage determinations are issued where contracts are subject to the Service Contract Act.* I do not think you can quibble with those two parts of the bill and I wholeheartedly support it.

Mr. THOMPSON of New Jersey. Mr. Speaker, will the gentleman yield?

Mr. ASHBROOK. I yield to the chairman of the subcommittee.

Mr. THOMPSON of New Jersey. Mr. Speaker, the gentleman is precisely right. The bill in essence is extremely simple, and you have very carefully made clear its two essential ingredients. It might be said in passing that when we had the Department back a second time they thought that the requirement that they make determinations within a year or two would be unreasonable in terms of administrative cost. The fact is that they have a maximum of five people working on this act now after 7 years of its operation, so in order to accommodate them, we stretched it out another 6 years.

Mr. ASHBROOK. I would add to what the gentleman said we are not asking them to do anything that they do not already do under the Davis-Bacon Act.

Mr. THOMPSON of New Jersey. You are exactly correct—or under the Walsh-Healey Act.

Mr. ASHBROOK. Or under the Walsh-Healey Act.

I cannot possibly convey to the Members of this House how personally repugnant I found the activities of many contractors dealing with what frankly must be the low, marginal employees on most of these bases; and for the Government to sanction a policy putting these people in a squeeze, I found personally repugnant.

I think most of you know I do not exactly get a whole lot of union support. The only union that ever supported

me was the WCTU, so I am certainly not motivated by any pressures that might come from unions. I am talking merely in terms of what is the best interests of these employees and how the Government can possibly hold up its head when it is in effect the employer.

Mr. HUNT. Mr. Speaker, will the gentleman yield?

Mr. ASHBROOK. I will be happy to yield.

Mr. HUNT. I take the opportunity to commend the committee, the chairman of the subcommittee, and you (Mr. ASHBROOK) for bringing this bill, H.R. 15376, to the floor and speaking out as you have.

Several years ago I had a situation with a corporation in my district who had a bid situation up in Alaska. They had had this bid for a number of years, and their employees were there with all of their equipment. They were underbid by another contractor. It resulted in a loss of wages and in certain places a little less money, but the fellows stayed there because they were located up there in the vast barren stretches and did not want to come home. The only thing they [27138] did was to take over the equipment, as it were, for less money, and still maintain the job.

Fortunately, this year when the bids came out, the company which had the bids originally regained them and put the wage scale back where it had been in the first place. *So it is about time this manipulation of underbidding by contractors for their own personal corporate gain came to an end.*

I wish to commend you and your committee for bringing this to the attention of Congress.

Mr. ASHBROOK. I thank the gentleman for his contribution. We will later hear from the gentleman from Florida (Mr. FREY) who has had similar experience and who will speak for this bill. *I think those who have seen the operations of this contract process certainly must question the Government's role, which, of course, would be part of our role, in sanctioning this type of squeezing.*

It is incredible, if you could read the testimony, if you could hear the testimony, how people had their wages reduced, wages which already by most scales are not high. As indicated, they are probably at the lower economic level, mostly custodial employese, those who work in dispensaries, those who work in cafeterias and to have these real low wages undercut as a part of the supposed fair and free bidding process in something which should not be sanctioned.

I certainly voice my very strong approval of this bill as a means of rectifying the situation.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. ASHBROOK. Yes, I yield to the gentleman from Iowa.

Mr. GROSS. I thank the gentleman for yielding.

This is the second bill in succession from the Committee on Labor and Education that carries no departmental report, no report of any kind. Can the gentleman advise me as to why there is nothing from the Department of Labor, or any other agency in Government?

Mr. ASHBROOK. First of all, I can say to the gentleman is not it a wonderful day late in the session which we can get bills out of the Committee on Labor and Education that do not have to be totally rewritten on the floor of the House?

I will say in all candor the administration favored the previous bill, but *the administration does not favor this bill.* I would say that if you study the hearings, Mr. Silberman, the Under Secretary of Labor who testified for the Department of Labor, indicated to the committee that, because the members of our committee were so unanimous on this bill and were so unanimous in our realization that there was an inequity, he would investigate them further, but a year and a half has gone by. *I would say to the gentleman from Iowa they have not done anything. They did not keep their word. Their position is simply they want no change in the law.*

I do not accept that as a valid position. That is why the committee in this case, and I think every member on the minority side except the gentleman from Illinois (Mr. CARLSON), agreed to this proposal, because we thought something needed to be done.

Mr. GROSS. I see no Department position in the report and I do like to know what position the Department is taking.

Mr. ASHBROOK. *The Department of Labor is opposed to this bill. They want no change in the act as it now stands,* and I think most of the Members after hearing the testimony do not agree with that position in all candor.

Mr. ANDERSON of Illinois. Mr. Speaker, will the gentleman yield for a question?

Mr. ASHBROOK. I yield to the gentleman from Illinois.

Mr. ANDERSON of Illinois. Mr. Speaker, will the gentleman respond to this argument, that it is administratively infeasible and filled with all kinds of ambiguities because it would require the Department of Labor to see whether any of these employees were covered by collective-bargaining agreements, and if they were, the employees could not be paid at lower than the rates in that agreement. How is the Secretary to know before the contract has been awarded or before particular specifications have actually been issued which employees are ultimately going to be employed by the successful contractor? He does not even know who will be successful, which contractor it is going to be, and therefore how would he know the employees, and therefore how would he comply with the requirements, and how could he come up with a contract containing terms and conditions that are not contrary to a collective-bargaining agreement covering the employees? I am simply desirous of getting information, because even though it is difficult to change people's minds on a bill under a suspension of rules with only 20 minutes on either side, still if the gentleman could re-

lieve my mind on that point it would satisfy some fears we have.

Mr. ASHBROOK. *I think if they do nothing else than require that they did at least include the wage level for the previous one, we would have accomplished a great deal.*

Mr. ANDERSON of Illinois. *Does the gentleman mean they have to consider the wage level that was used in a preceding contract?*

Mr. ASHBROOK. *If they have a successor contractor, they would have to consider the wage of the predecesor contractor.*

Mr. ANDERSON of Illinois. If the gentleman will yield further, *is there not a Supreme Court decision somewhere that says something on this point?*

Mr. ASHBROOK. *The Burns decision?*

Mr. ANDERSON of Illinois. *Is there not a decision that it is not required that a successor contractor be bound by the terms and conditions of a labor contract entered into by his predecessor?* I do not have the citation handy, but it seems to me there is a decision to that effect and therefore *this would rewrite existing law as interpreted by the U.S. Supreme Court. I think it was a National Labor Relations Board against Burns Security Services case.*

Mr. ASHBROOK. I would say to the gentleman from Illinois, who is learned in this area, as I understand it *the Burns case dealt with a private employer, and the Congress time and time again has set standards for people who do contract business with the Government,* and the Walsh-Healey Act has set different standards, and the Davis-Bacon Act has set different standards, and the Service Contract Act has set different standards. *It is like comparing apples with oranges. A contract with a person in the private sector is totally different from a contract in a situation where the contractor is doing business with the Government.* We have always made a difference in Walsh-Healey and in Davis-Bacon and in

the Service Contract Act. *So the same thrust of law relating to predecessor and successor contracts would apply to the public sector but not necessarily the private sector.*

Mr. ANDERSON of Illinois. To return to the point, does not this pose some administrative difficulties when we cannot tell to whom the contract will be awarded? How does one administer this provision which says we have to take into consideration previous bargaining conditions?

Mr. O'HARA. Mr. Speaker, will the gentleman yield?

Mr. ASHBROOK. I yield to the gentleman from Michigan.

Mr. O'HARA. Mr. Speaker, we are talking about whether the old contractor had an effective bargaining agreement, and the way the act works, the contracting agency has to supply certain information to the Department of Labor and then the Department of Labor makes its determination. All we have to do is have the contract agency supply one additional piece of information and that is whether a collective bargaining agreement now covers those employees and what it applies to, and then the Department of Labor will know.

Mr. THOMPSON of New Jersey. Mr. Speaker, I yield such time as she may consume to the distinguished gentlewoman from Massachusetts (Mrs. HICKS).

Mrs. HICKS of Massachusetts. Mr. Speaker, I should like to commend the chairman of the Subcommittee on Labor for bringing this matter before the House.

Mr. Speaker, I rise in support of H.R. 15376, a bill to amend the service contract of 1965.

The Special Subcommittee on Labor, on which I serve, conducted exhaustive oversight hearings on the way this act has been administered since 1965. We found problems under both Democratic and Republican administrations, and tried to take a completely bipartisan approach to solving these problems.

I believe that the bill we have reported out, and it was reported out unanimously from our subcommittee and the full Committee on Education and Labor, will go a long way toward making the Service Contract Act an effective vehicle for protecting the wages and fringe benefits of service workers.

These service workers are among the [27139] lowest-paid workers in the United States. They are the laundry workers, busboys, dishwashers, guards, janitors, and other workers performing housekeeping functions under Government service contracts. These workers on the bottom rung of the economic ladder are the ones the Congress tried to protect in 1965 when it enacted the Service Contract Act.

The Service Contract Act simply provided a method for protecting the wages and fringe benefits being paid service workers, by directing that they be paid at least the prevailing rates in their local area.

For various reasons the act has not worked as well as was originally intended, and we discovered countless instances where faulty wage determination procedures had worked great hardships on service workers and their families.

I believe the bill we have devised will prevent the tragic economic hardships which are visited upon these workers under the present operation of the act, and *will make it clear that the Congress meant business when it set out to protect service workers.*

Mr. THOMPSON of New Jersey. Mr. Speaker, it is rather unique that I yield to a distinguished opponent of the legislation, the gentleman from Georgia (Mr. BLACKBURN) 3 minutes.

Mr. BLACKBURN. I appreciate the gentleman's yielding to me 3 minutes.

Mr. Speaker, I rise in opposition to the motion to suspend the rules. The bill before us seeks to improve the lot of service contract workers, but it would not accomplish that purpose. It is confusing on its face, and if it

were enacted it would vastly complicate the Service Contract Act, which in turn would lead to delay and abuse in the service contracting process. Let me briefly mention some of the problems of the bill.

First, the Secretary of Labor, who is charged with the responsibility of making the wage and fringe determinations, would be forced to make a determination for each individual contract in many cases where he now may make a single determination which applies to many service contracts in a particular locality. This single determination procedure permitted under the present law conserves valuable resources, saves time and prevents duplication of effort. If this bill is enacted, many more determinations will be required, resulting in delays and confusion in the service contracting process. Service employees have nothing to gain and much to lose by this amendment.

Second, the bill would foreclose, within a few years, the existing authority to omit making wage and fringe determinations in those cases of minimal impact and importance in the application of the statute. It would thus limit and ultimately eliminate the present administrative flexibility to allocate resources available for making wage determinations in those areas and contracts where substantial needs for wage and fringe protections exist.

Third, sections 2(a)(1) and (2) provide that minimum wage rate and fringe benefit determinations may include prospective increases provided for in a collective bargaining agreement.

Is it intended by this provision to permit acceleration of deferred wage and fringe benefit increases? If so, it seems to us that this could seriously jeopardize the national effort to curb inflation—particularly insofar as the provision could have a precedential effect for other areas of Government contract work or, indeed, might "spillover" as a practical matter to the public and private employment sectors generally.

At the very minimum, this provision would clearly benefit by clarification and rephrasing to assure that it does not authorize acceleration of deferred increases. Under the suspension of the rules, however, this will not be possible.

Fourth, *section 3(c) provides that, in the case of successor contracts under which substantially the same services are furnished, the minimum wage rates and fringe benefits to be paid by the successor contractor may not be less than those paid under the predecessor contract—and may also include any prospective increases which were provided for under the predecessor agreement. This is so even if the successor contractor employs his own work force and does not retain any of the predecessor contractor's employees.*

At a time when the American taxpayers are demanding—and deserve—economy in Government, this provision would serve to guarantee ever-increasing labor costs in service contracts. Beyond this, it introduces a major new concept into our national labor policy.

In NLRB against Burns International Security Services, Inc.—decided May 15, 1972—the U.S. Supreme Court ruled unanimously that a successor contractor is not obligated to observe his predecessor's collective bargaining agreement. Section 3(c) of H.R. 15376 would in net effect overturn this decision.

If it is the will of the House that our national labor laws should now be rewritten to provide for compulsory imposition of the terms of collective bargaining agreements on employers and employees who were not parties to the agreement, we respectively suggest that this is a decision to be made only after the most thorough and extensive debate with full opportunity for Members participation through the amendment process. It is not, in our opinion, a decision to be made in summary fashion as part of a package deal in which the hands of the Members are tied.

Fifth, the bill limits the Secretary of Labor's discretion and flexibility in two important respects. Under these proposed amendments, he may grant a variation or exemption only in special circumstances, and he may act to relieve a contractor from being listed ineligible only in unusual circumstances. Unfortunately, the bill does not define either of these terms and the Secretary and everyone else who has an interest in this legislation is left without any guidance. This is yet another example of how this legislation fails to do the job it purports to do. Legislation is supposed to serve as a guide to conduct, and that requires thoughtful and careful preparation and drafting. It would be a shame for this House to suspend the rules and bring this bill to a vote because it clearly needs more careful consideration. As it stands now, it can only honor the interests of service workers by saddling them with a mandate for confusion.

Last, the proposed amendments raise serious due process questions because it requires that a contractor who has violated the act, unless relieved due to the unexplained unusual circumstances I just mentioned, must be listed as ineligible within 30 days after a hearing examiner has made his finding. This gives a contractor virtually no time to pursue his existing appellate remedies or seek review which might exonerate him. Bear in mind that this hard and fast rule would apply even if the violation were de minimis and involved no element of willfulness. Such violations are common, and therefore would not seem to allow for relief as unusual circumstances.

Mr. Speaker, no one will claim that the present Service Contract Act is perfect in either conception or administration. But the bill before us is confusing and would only complicate and confuse matters.

In this regard, it is significant to note that the committee was unable to arrive at an estimated cost of administering the act as it is proposed to be amended because of uncertainties over the best technique for mak-

ing wage and fringe benefit determinations—House Report No. 92-1251, page 6. Yet the committee has nonetheless taken steps to assure that the Department of Labor will make such determinations for each and every contract subject to the act. It seems to us that a valid question may be raised as to whether the committee has not put the cart before the horse. Would it not be better to first ascertain improved techniques for making wage and fringe benefits determinations before sending the Labor Department out with a blank check to apply admittedly poor or unevaluated techniques to an even greater number of contracts than at present?

The report of the Committee on Education and Labor states that H.R. 15376 is designed to bring about more equitable and more efficient administration of the Service Contract Act. We, of course, fully support this highly desirable goal.

However, it seems to us that it would be far more consistent with the avowed purpose to subject the legislation to the sounding board of full and complete debate, including the amendment process, rather than to have it come up, as scheduled, on a take it or leave it basis.

For our part, the issues posed in this legislation are too serious to treat in such an abbreviated fashion. The bill should be referred back to committee so that it may be brought to the floor at a later time in accordance with the usual procedures of the House allowing Members the fullest freedom to work their will on its various provisions.

Mr. THOMPSON of New Jersey. Mr. Speaker, I yield 2 minutes to the gentleman from Texas (Mr. GONZALEZ).

Mr. GONZALEZ. I thank the distinguished gentleman from New Jersey for granting me this time. [27140]

I rise merely to support this bill and to urge its enactment because of its overdue need.

Those of us who cosponsored and otherwise helped as to the passage of the 1965 act were certainly under the

impression then that the thing this present amendment leads to correcting had been taken care of.

All this bill will do, regardless of the scare talk about administrative costs and the like, is to substitute for the law of the jungle as it now exists a rule of reason and equity and justice.

In my district for 10 years, since I have been in the Congress, I have had repeated specific occasions of abuse that have given rise to an urgent need to enact this legislation. I so urge my fellow Members.

Mr. ASHBROOK. Mr. Speaker, I yield the remainder of my time to the gentleman from Illinois (Mr. ERLENBORN).

Mr. ERLENHORN. Mr. Speaker, this bill has several objectionable features. It presents a seemingly impossible administrative mandate by requiring that the Secretary of Labor make wage determinations in accordance with collective bargaining agreements covering service workers at a point in time when there is no way to tell whose service workers they may be, let alone whether any of them are covered by a collective bargaining agreement. It severely limits the administrative flexibility in dealing with violators of the act and raises a substantial question of the rights of due process for those accused of violations. It incorporates a successor contractor doctrine that could lead to inflationary wages, much higher than the true prevailing wages and could result in unnecessary and unjustified expense to the Government and, thence to the taxpayers.

But perhaps most importantly, it would require that within a few years the Secretary will have to make a wage determination with respect to each and every contract subject to the act. On initial consideration, this requirement might not sound unreasonable, but it takes only a few seconds to realize that this requirement places an enormous burden on the Secretary. Indeed, one does not have to be an expert in either labor relations or the science of effective government to recognize that such

a requirement is unrealistic and impractical. The administrator of a program must have sufficient flexibility to allocate his resources efficiently. Under this particular amendment, there is no such flexibility. A determination would have to be made for every single contract even those involving only one or two employees. It appears that the sponsor of the bill, well-intended though he may be, has lost sight of the forest in his quest to protect each individual tree.

Mr. Speaker, I would point out that this requirement is an extraordinarily unusual one. The major labor-relations legislation in this country, the Taft-Hartley Act, allows the National Labor Relations Board to exercise flexibility in its coverage. The Cost of Living Council, for example, also has rules excluding small businesses.

Presently, the Secretary receives about 21,000 notices of service contracts each year. Under the present law, he has sufficient latitude to allocate his limited resources in the most efficient fashion, making wage determinations for those contracts covering the substantial majority of workers.

This bill is touted as being strongly in the workers' interest, but it *is not in the interest of the service employees to tie the administrator of the law to a wasteful and rigid requirement such as this.* The Secretary must have sufficient latitude to allocate his resources to those contracts and localities where the need is greatest.

Mr. Speaker, I hope this motion to suspend the rules will be defeated so the bill may be brought back under a rule for full debate and subject to amendment.

Mr. ASHBROOK. Mr. Speaker, will the gentleman yield?

Mr. ERLENBORN. I am glad to yield to the gentleman.

Mr. ASHBROOK. I will say to the gentleman while I support the principle of the bill, I would prefer to have it here under a rule. I agree with the gentleman's re-

marks on that. I always like us to have an opportunity for amendment. I will still support the principle.

Mr. ERLENBORN. I thank the gentleman for that observation.

I think bills that are as important as this and which are controversial certainly ought to come out under a rule where amendments can be offered. This sort of gag rule is not good practice.

Mr. BLACKBURN. Will the gentleman yield?

Mr. ERLENBORN. I yield to the gentleman.

Mr. BLACKBURN. I appreciate the gentleman yielding.

Does he not think there is a distinct possibility that competitive bidding on Government contracts may be decreased because the potential bidders may be scared off by the provisions of this bill? They are not sure what the obligations may be when they take over an existing contract.

Mr. ERLENBORN. Obviously the potential bidder will be bound by the determinations made by the predecessor. The predecessor may negotiate several increases that are unreasonable just to protect his competitive advantage. We may find it will work not only to the disadvantage of those desiring to compete but also to the disadvantage of the Government as well.

Mr. THOMPSON of New Jersey. Mr. Speaker, I have one comment and then I will yield to the gentleman from Michigan (Mr. O'HARA) for 5 minutes.

The major contractors involved in this industry including Sperry Rand, TWA, Boeing, Pan Am, Brown Root, and Northrop, all support this bill.

I might say to the gentleman from Illinois (Mr. ERLENBORN) that this bill was not sneaked out of the committee in the dark, and it does not come here without a report. The only amendments offered in the committee were those by the gentleman from Minnesota (Mr. QUIE). The committee reported this bill unanimously.

Mr. Speaker, I now yield 5 minutes to the gentleman from Michigan (Mr. O'HARA).

Mr. O'HARA. Mr. Speaker, I think this bill is unique, and I would like to explain just why.

H.R. 15376, is the result of bipartisan oversight hearings, generating a bipartisan reaction to a problem which had, I regret to say, bipartisan roots.

H.R. 15376 does not represent a quarrel between Democrats and Republicans, or betwen liberals and conservatives. Rather, it *represents an effort by the Congress to reassert its policymaking primacy over the bureaucracy.*

This is a bill that was put together by Democrats and Republicans in the committee. It was not put together by the agencies downtown. It was not put together by any outside group. It was put together in hard bargaining and discussion sessions following oversight hearings by the members of the committee. There is not a member of the committee who participated in those hearings who does not have some imprint on this bill. We worked it out together. We tried to take seriously our responsibilities for legislative oversight, and we sat down with the Department, and with witnesses, and we asked how has this act been administered? What is right about it? What is wrong about it?

After we had heard all of that then we sat down and tried to work out together our responsibilities as a committee, to this House, and to the people of the United States. I think that is the way the Congress ought to work.

The Service Contracts Act of 1965, of which I was one of the authors, was an effort to apply to employees of Government service contractors the same protections that have long applied to employees of Government construction contractors and Government procurement contractors.

That act to state it simply, set forth a determination by the Congress that the employees of these contractors

must be paid not less than the prevailing wage paid to other employees engaged in similar work in the same area. To enforce this obligation, covered contractors had to agree to meet these standards as a part of their contract, and if they were found not to have done so, they were to be barred from further contracting for periods up to 3 years, except when unusual circumstances warranted the Secretary of Labor in lifting the penalty.

The principle of law involved was a simple one, and it had long been a part of the Federal statutes with respect to other contractor employees.

Unfortunately, in our oversight hearings we discovered that it had not been working as intended. *We found widespread exploitation of service employees by "contractors" who were little more than labor brokers,* and *we found—and this, Mr. Speaker, was far more reprehensible—widespread indifference or even hostility to the intent of the Service Contract Act among agencies of the Government itself. This was compound-* [27141] *ed by an attitude on the part of the enforcing agency—the Labor Department—which seemed to overlook no opportunity to render the act nugatory.*

We found the Department refusing, at the behest of other Federal agencies, to make prevailing wage determinations when such refusal had the clear effect of depressing those wages. * * *.

We found interpretations of the law, which served to undercut legitimate labor-management agreements.

We found the Department willing to ignore the clear language of the act with regard to the penalty—disbarment from contracting—and willing instead to accept partial restitution as though it were in and of itself a penalty.

We found, in short, a serious lack of enforcement of, and lack of commitment to, the Service Contract Act of 1965. We found this throughout the agencies involved, including, if I must say so, the General Accounting Office,

which is supposed to be the agency primarily charged with the enforcement of the will of the Congress.

And, in all fairness, I must reiterate, we did find that this problem began with this administration.

I am grieved to find my friend, the able gentleman from Illinois (Mr. ERLENBORN) coming in here and reiterating the Labor Department's arguments. We are not a part of the executive branch. *We do not need the Labor Department's permission to legislate, Mr. Speaker. That branch does not have the right to tell us what to do, especially when it involves something that they have bungled as badly as they have bungled the administration of this act.*

It was suggested by members of the committee on both sides, that we should take a look at this act and see if we could not improve its administration. That is what we have done. There is no insurmountable difficulty imposed on the bureaucrats in the administering of this law. They will be able to do a better job of achieving the purposes of the Service Contract Act with these amendments than they have done thus far without them.

The only ones who are going to be hurt are the fly-by-night contractors, not the reputable contractors, not the people who are in the business year in and year out, and who have it tough enough. Mr. Speaker, even when the tomorrow, but the two-bit operators who are out to make a quick killing. They are the ones who are going to be hurt by this legislation.

Many of the amendments made by H.R. 15376 are clarifying amendments. They clarify the original intent to the Congress and reiterate, for the attention of the executive branch agencies and the GAO, that our intention is to prevent the use of Government procurement power to depress wages and exploit service employees—who have it tough enough. Mr. Speaker, even when the act is working as it is supposed to work.

Mr. THOMPSON of New Jersey. Mr. Speaker, I yield 3 minutes to the gentleman from Florida (Mr. FREY).

Mr. FREY. Mr. Speaker, speaking for myself, I am as familiar with this problem as any Member in the House in that my district is in the cape area.

About a year ago I contacted, along with some others, my distinguished colleague, the gentleman from New Jersey (Mr. THOMPSON) to ask the subcommittee to hold hearings on this problem.

We have heard a great deal today about the burden on the Department of Labor, but I think that really what all of us are concerned with is the burden on the individual, with the individual who is working for his living and ends up, as many people in my district did, by losing their jobs, or who end up with a new contractor who comes in and who fires about one-third of the people in a wage bid process, and then reduce the pay for the others on an average of about 17 percent, and some of them up to 50 percent.

Nobody really wants to bid one company against another when only the wages of the workers are involved, and reduce them as much as possible so that they can get a contract they can live with.

All of us I am sure seek efficiency in Government contracts, but we should also take into account the effect this type of bidding has in terms of the cost of closing out, in terms of the cost of worker morale, in terms of the cost of labor-management strife. In the long run, I think it costs more than is saved by reducing salaries. But I think there is a lot more involved here than the economics: I think you have to include the human element also. And for those of you who have not experienced something like that, then I would like to see you try to explain to somebody how one day they can be doing a job and earning x amount of money, and the next day doing the same work but with a different contractor their salaries are reduced by 50 percent. It does not make sense. I think this is wrong. I think this is a good piece of legislation, and I urge its adoption.

The SPEAKER. The question is on the motion offered by the gentleman from New Jersey (Mr. THOMPSON) that the House suspend the rules and pass the bill H.R. 15376, as amended.

The question was taken.

Mr. ERLENBORN. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members and the Clerk will call the roll.

The question was taken; and there were—yeas 274, nays 103, not voting 55, as follows:

* * * *

[27142] So (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

[31281]

SERVICE CONTRACT ACT AMENDMENT OF 1972,

Senate, Sept. 19, 1972, 118 Cong. Rec. 31281-31282

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 1074, H.R. 15376.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (H.R. 15376) to amend the Service Contract of 1965 to revise the method of computing wage rates under such Act, and for other purposes.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Labor and Public Welfare with amendments.

On page 1, line 3, after the word "including", strike out ", *if the Secretary so elects,*";

On page 2, line 7, after the word "including", strike out ", *if the Secretary so elects,*";

In line 14, after the word "employees", strike out "of" and insert "if";

On page 3, after line 2, strike out:

"(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and, if the Secretary so elects, any prospective increases in wages and fringe benefits provided for in a collective bargaining agreement as a result of arm's length negotiations, to which such service employee would have been entitled if he were employed under the predecessor contract.

And, in lieu thereof, insert:

"(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under

which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

On page 4, line 18, after the word "than", strike out "thirty" and insert "ninety";

On page 5, line 22, after "1977," insert "and for each fiscal year thereafter,";

On page 6, line 1, after the word "employed.", insert a quotation mark;

And, after line 2, strike out:

"(6) For the fiscal year ending June 30, 1978, and for each fiscal year thereafter, all contracts subject to this Act."

The amendments were agreed to.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

Mr. GRIFFIN. Mr. President, I ask unanimous consent to have printed in the RECORD a statement by the distinguished Senator from Florida (Mr. GURNEY).

The PRESIDING OFFICER. Without objection, it is so ordered.

STATEMENT BY SENATOR GURNEY

With the passage today of H.R. 15376, to revise the method of computing wage rates under the Service Contract Act of 1965, the Senate has joined with the House

of Representatives in establishing some much needed and long overdue protections for individuals all over this country who are employed under service contracts with the Federal Government. This piece of legislation other than some committee changes, is identical to S. 3827, which I introduced with the distinguished Senator from New Jersey (Mr. WILLIAMS). I was also especially pleased to have as a co-sponsor of the legislation my esteemed colleague from Alaska (Mr. STEVENS).

Mr. President, there is no question that this legislation was needed. Despite the present existence of the Service Contract Act of 1965, a cloud of professional and economic uncertainty hovers over the heads of one million service contract workers fulfilling 25 [31282] thousand service contracts. Experiences at Cape Kennedy in my own State of Florida clearly indicate that regardless of how loyal or how hard working or how skilled an employee is, regardless of how long he has been working under one of these service contracts, he faces the possibility every year or so, that a new company will come in and successfully underbid his employer.

When this happens, he finds himself possibly out of work, definitely reduced in income, fringe benefits, seniority and stripped of pension rights. This occurred at the Kennedy Space Center and nearly repeated itself at Patrick Air Force Base.

It has occurred in other service contract situations. This legislation confronted the Congress with the decision as to whether or not it is moral to trade men's wages and careers for the sake of expediency. And Congress has today decided in the negative.

In these service contracts, the major factor up for bid is wages. Since that is the only factor that really amounts to anything, it is very tempting to get in a low bid, by bidding down wages. It seems to me that Congress has acted wisely with this legislation to insist that an unconscionable cut-throat bidding does not sacrifice

the lives of individuals who have worked so hard, so long, and so loyally for Federal programs.

Mr. President, the economic aspects of this cutthroat activity I am talking about is not limited to the employees involved and their families, the repercussions are community wide.

Banks find themselves in the position of having to foreclose on houses which then become a glut on the market. Property values decline sharply. Automobiles and other personal property are foreclosed. Merchants are hit hard because people cannot afford to purchase goods. The entire economy of an area which depends on Government operations is quite literally blown apart.

This bill is a simple one. It merely requires that a successful bidder on a service contract cannot pay employees less than they were receiving from their former employer unless his wages are out of line. These provisions are long overdue. They should have been incorporated in the Service Contract Act when it was passed in 1965.

Many of us thought with the passage of that legislation that the problem confronting these service contract employees was solved. However, we have seen situations where the Department of Labor refused to make any wage study as provided under the act at all, choosing to totally abandon these employees.

And when, as occurred last year at Patrick Air Force Base, through active congressional intervention on the part of myself and others, we were able to force the Department of Labor to make a wage survey, the criteria selected was such that the employees were still forced to take drastic cuts in wages. Thus, it became clear that the one possible saving grace of the whole bill, namely the possibility of wage surveys to establish levels of wages fringe benefits, did not function in an adequate manner.

For example, in that Patrick situation, a wage survey was conducted over a multicounty area, much of which

was rural with a lower economic base. Thus, the wage study, while an improvement over what might have occurred had one not been conducted, still was not an adequate safeguard against the kind of unfair practices that I am concerned about.

To force lower wages and reduce benefits for a man of 40 plus years of age who has worked hard all his life to build up some financial security and seniority—to literally pull the rug out from under him—is not only unjust but unconscionable.

Extensive oversight hearings by the special subcommittee on Labor of the House Education and Labor Committee produced findings which support my personal experience. Among the findings of the committee were these:

(1) The Department of Labor has failed to make wage and benefit determinations for almost two-thirds of those contracts subject to the act. (Indeed, as I have pointed out in the case of Patrick Air Force Base, Florida, *only the firmest of congressional pressure was able to penetrate the department's bureaucratic inertia and to get a study undertaken.*)

(2) A section of the act giving the Secretary of Labor discretion in administering the act has been stretched far beyond what the Congress intended.

(3) The practice of rebidding contracts, either without wage and fringe determinations, or with unrealistically low determinations, is creating chaos for reputable contractors and great hardships for employees.

The legislation we have passed today will end these problems. It will ensure that wages and fringe benefits are not cut to ribbons in the process of contract bidding. It will help establish some equality between these service contract employees and those performing the same jobs for a Federal agency under title 5, United States Code.

I should like to make one final point. In all of these service contract situations, the ultimate employer is in

fact the Federal Government. It is the Federal Government who decides if an installation is going to be placed in a particular area. It is the Federal Government who decides the work to be done on that installation. It is the Federal Government who puts out the bids for the service contract which employ the people that we are concerned with protecting. The Federal Government, therefore, has a very, very strong responsibility to these people and to their communities. It does not meet these responsibilities by sitting back and through inaction, or inappropriate action, permitting the economic lives of individuals and the economic lives of communities to be placed on the auction block and sacrificed.

I would submit to you that this legislation is long overdue. Much damage has been done. Fortunately, the Senate has finally acted in this matter to avoid the further repetition of past mistakes.

29 CFR Part 4
32 Federal Register, July 8, 1967,
(page citations below in brackets)
(Proposed Date), 33 Federal Register (July 10, 1968),
29 CFR 9880-9881 (Effective Date)

[10138]

[§ 4.133 Government as beneficiary of contract services.

(a) *In general.* The Act does not say to whom the services under a covered contract must be furnished; so far as its language is concerned, it is enough if the contract is "entered into" by and with the Government and if its principal purpose is "to furnish services in the United States through the use of service employees." The legislative history indicates an intention to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose needs it is necessary or desirable for the Government to make provision for such services. Such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations, for example, were specifically referred to. Where the principal purpose of the Government contract is to provide these or other services to the Government or its personnel through the use of service employees, the contract is within the general coverage of the Act regardless of the source of the funds from which the contractor is paid for the service and irrespective of whether he performs the work in his own establishment, on a Government installation, or elsewhere. The fact that the contract permits him to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not require a different conclusion.

(b) *Special situations.* It is not considered that the Act was intended to cover every contract, however, which is entered into with the Government by a contractor to furnish services, no matter how indirect or remote a

benefit the Government may derive therefrom. If, for example, a contract with the Government grants the contractor the privilege of operating as a concessionaire in a Government park for the purpose of furnishing services to the public generally rather than to the Government or to personnel engaged in its business, the contract is not considered subject to the Act. Since the statute itself provides no clear line of demarcation, questions of contract coverage where doubt arises because of remoteness of benefit to the Government from the services to be furnished should be referred to the Administrator of the Wage and Hour and Public Contracts Division for resolution.

29 CFR Part 4

44 Federal Register 77036, December 28, 1979

Service Contract Act; Labor Standards
for Federal Services Contracts

Agency: Wage and Hour Division, Labor

Action: Proposed rule. (All emphasis is added).

[77036]

Summary: It is proposed to amend Regulations on Labor Standards for Federal Service Contracts, Part 4 issued under the Service Contract Act. *Thorough substantive updating and clarification have not taken place since 1969 with respect to this regulation. Most proposed changes are made to reflect longstanding policies, rulings, and interpretations developed in the course of our experience in administering and enforcing the Act over the years.*

* * * *

Supplemental Information: * * *

4. Section 4.5(c)(2)—This proposed revision requires contracting agencies to include contract stipulations of

the Act and any applicable wage determination in a contract within 30 days of notification by the Department of Labor *where it is determined by the Department that the agency made an erroneous decision that the Act did not apply.*

* * * *

[77038]

§ 4.1a Definitions and use of terms.

* * * *

(c) "Administrator" means the Administrator of the Wage and Hour Division, or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division, is designated to act for the Administrator under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator for the performance of functions relating to the making of wage determinations and the enforcement of the Service Contract Act of 1965, as amended, and this part.

* * * *

(e) "Contract" includes any contract subject wholly or in part to provisions of the Service Contract Act of 1965 as amended, and any bid specification or subcontract of any tier thereunder. (See §§ 4.107-4.134.)

(h) "Wage determination" includes any determination of minimum wage rates or fringe benefits made pursuant ot the provisions of sections 2(a) and 4(c) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of $2,500 which is subject to the provisions of the Service Contract Act of 1965.

§ 4.1b Payment of minimum compensation based on collectively bargained wage rates and fringe benefits applicable to employment under predecessor contract.

(a) *Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the act and under which substantially the same services as under the predecessor contract are furnished* for the same location. *Section 4(c) provides that no such contractor or subcontractor shall pay any service employee employed on the contract work less* than the wages and fringe benefits provided for (sic) in a collective bargaining agreement as a result of arms-length negotiations, *to which such service employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement.* * * *

[77039]

§ 4.3 Wage determinations.

(a) The minimum monetary wages and fringe benefits for service employees which the Act requires to be specified in contracts and bid specifications subject to section 2(a) thereof will be set forth in wage determinations issued by the Administrator. Wage determinations shall be issued as soon as administratively feasible for all contracts subject to section 2(a) of the Act, *and will be issued for all contracts entered into under which more than 5 service employees are to be employed.*

* * * *

§ 4.4 Notice of intention to make a service contract.

(a) For any contract exceeding $2,500 which may be subject to the Act, the contracting agency shall file with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. Such notices shall be filed not less than 90 days (nor more than 120 days, except with the approval of the Wage and Hour Division) prior to (1) any invitation for bids, (2) request for proposals, (3) commencement of negotiations, (4) annual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress, or (5) on each bi-annual anniversary date of a multi-year contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division. (See § 4.4(d)). *If there exists any question or doubt as to the possible application of the Act to a particular procurement, the contracting agency shall submit such question in a timely manner to the Administrator for determination. Such notice shall be submitted on a Standard Form 98, Notice of Intention to Make a Service Contract, and Standard Form 98-A or a statement containing the information in paragraph (b) of this section* and shall be completed in accordance with the instruction provided and shall be supplemented by the information required under paragraphs (c) and (d) of this section.

* * * *

[77040]

(f) * * * *In no event may a contract on which more than 5 service employees are contemplated to be employed be awarded without an appropriate wage determination. (section 10 of the Act.)*

(g) If any invitation for bids, request for proposals, or commencement of negotiations for a proposed contract for such a wage determination was provided in response to a Standard Form 98 has been delayed, for whatever

reason, more than 30 days from the date of such procurement activity as indicated on the submitted Standard Form 98, the contracting agency shall contact the Office of Government Contract Wage Standards, Wage and Hour Division, for the purpose of determining whether the wage determination issued pursuant to the initial submission is still current. *Any revision of a wage determination* received by the contracting agency as a result of such communication or *upon discovery by the Department of Labor of a delay, shall supersede and replace the earlier response as the wage determination applicable to such procurement.*

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

(a) Any contract agreed upon in excess of $2,500 shall contain an attachment specifying the minimum wages and fringe benefits for service employees to be employed thereunder, as determined in any applicable currently effective wage determination, including any expressed in any document referred to in paragraphs (a) (1) or (2) of this section:

* * * *

[77041]

(2) * * *

(c) (1) If the notice of intention required by § 4.4 is not filed with the required supporting documents within the time provided in such section, *the contracting agency shall,* within 30 days of receipt of a wage determination *through the exercise of any and all of its power and authority that may be needed (including, where necessary its authority to negotiate, its authority to pay any necessary additional costs, and its authoriy under any provision of the contract authorizing changes) to include in the contract any wage determinations communicated to it by the Wage and Hour Division,* Employment Standards Administration, U.S. Department of Labor.

(2) *Where the Department of Labor discovers and determines, whether before or subsequent to contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement,* the contracting agency, within 30 days of notification by the Department of Labor, *shall include in the contract the stipulations contained in § 4.6* and *any applicable wage determination issued by the Administrator* or his authorized representative *through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). (G.L. Christian & Associates v. U.S.,* 312 F.2d 418 (Ct. Cl. 1963), rearg. denied 320 F.2d 345, cert. denied 375 U.S. 954. reh. denied 376 U.S. 929, reh. denied 377 U.S. 1010 (53 Comp. Gen. 412 (1973); *Curtiss-Wright Corp. v. McLucas,* 381 F.Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2 v. Military Sealift Command,* 86 CCH Labor Cases ¶ 33,782 (D DC 1979); *Brinks, Inc. v. Board of Governors of the Federal Reserve System,* 86 CCH Labor Cases ¶ 33,792 (D DC 1979). (See also 32 CFR 1-403.)

* * * *

§ 4.6 Labor standards clauses for Federal service contracts exceeding $2,500.

The clauses set forth in the following paragraphs shall *be included in full by the contracting agency in every contract (and any bid specification therefor)* entered into by the United States or the District of Columbia, in excess of $2,500, or in an indefinite amount, *the principal purpose of which is to furnish services through the use of service employees:*

(a) Service Contract Act of 1965, as amended: *This contract, is subject to the Service Contract Act of 1965, as amended (41 U.S.C. 351)* and is subject to the follow-

ing provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor issued thereunder (this Part 4).

(b) (1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract. Unless specified otherwise in the wage determination, the contractor must consider an employee's length of service with the predecessor contractor(s), if any, in determining the employee's wages and fringe benefit entitlements.

* * * *

(b) (2) (iii) If the parties do not reach an agreement or acknowledge disagreement within this 30-day period on a proper classification which is, in fact, conformable, the *contracting officer shall promptly submit the question,* together with his or her recommendations and *all pertinent information, including the positions of employees* if in *disagreement,* to the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, of the Department of Labor *for final determination.*

* * * *

[77042]

(b) (2) (v) Failure to pay such unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Office of Government Contract Wage Standards *retroactive to the date such class of employees commenced contract work shall be a violation of the Act and this contract.*

* * * *

(b) (2) (vii) Failure *by the contractor* to comply with its responsibilities in sections (b) (2) (i) through (vi) of this section *shall also be a violation of the Act and this contract.* Upon discovery of *such violations, the Office of Government Contract Wage Standards shall then make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work.*

* * * *

3) (d) (2) If this contract succeeds a contract, subject to the Service Contract Act of 1965 as amended under which substantially the same services were furnished and service employees were paid wages and fringe benefits *provided for in a collective bargaining agreement* (sic), *in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits,* neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits, *provided for in such collective bargaining agreements, to which such employee would be entitled if employed under the predecessor contract,* including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. * * *

[77043]

(3) (k) As used in these clauses, the term "service employee" means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity * * *.

[77044]

§ 4.10 Substantial variance proceedings under section 4(c) of the Act.

(a) *Statutory provision. Under section 4(c) of the Act,* and under wage determinations made as provided in section 2(a)(1) and (2) of the Act, *contractors and subcontractors performing contracts subject to the Act generally are obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would have* [77045] *been entitled under a collective bargaining agreement if they were employed on like work under a predecessor contract.* (see §§ 4.1b, 4.3, 4.6(d)(2)). Section 4(c) of the Act provides, however, that 'such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality'.

(b) *Prerequisites for hearing.* (1)(i) A request for a hearing under this section may be made by the contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Government agencies. * * *

* * * *

[77048]

§ 4.101 Official rulings and interpretations in this subpart.

(a) The purpose of this subpart is to provide, pursuant to the authority cited in § 4.102, official rulings and interpretations with respect to the application of the McNamara-O'Hara Service Contract Act for the guidance of the agencies of the United States and the District of Columbia which may enter into and administer

contracts subject to its provisions, the persons desiring to enter into such contracts with these agencies, and the contractors, [77049] subcontractors, and employees who perform work under such contracts.

(b) These rulings and interpretations are intended to indicate the construction of the law and regulations which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress or *by authoritative ruling of the courts,* or if it is concluded upon reexamination of an interpretation that it is incorrect. *The Department of Labor (and not the contracting agencies) has the primary and final authority and responsibility for administering and interpreting the Act, including making determinations of coverage.* See *Nello L. Teer Co. v. United States,* 348 F.2d 533, 539-540 (Ct. Cl. 1965), cert. denied, 383 U.S. 934 (Davis-Bacon Act); *North Georgia Building & Construction Trades Council v. U.S. Department of Transportation,* 399 F. Supp. 58, 63 (N.D. Ga. 1975) (Davis Bacon Act); *Zachry Co. v. United States,* 344 F.2d 352 (Ct. Cl. 1965) (Davis-Bacon Act); *Curtiss-Wright Corp. v. McLucas,* 364 F. Supp. 750, 769-72 (D.N.J. 1973); and 43 Aty. Gen. Ops.—(March 9, 1979); 53 Comp. Gen. 647, 649-51 (1974); 57 Comp. Gen. 501, 506 (1978).

* * * *

(d) The interpretations of the law contained in this part are official interpretations which may be relied upon. The Supreme Court has recognized that such interpretations of the Act 'provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it' and 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (*Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)). *Interpretations of the agency charged with administering an Act are generally afforded deference by*

the courts. (*Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)); *Udall v. Tallman*, 380 U.S. 1 (1965).)

* * * *

[77050]

§ 4.105 The Act as amended.

(a) The provisions of the Act (see §§ 4.102-4.103) were amended, effective October 9, 1972, by Public Law 92-473, signed into law by the President on that date. By virtue of amendments made to paragraphs (1) and (2) of section 2(a) and the addition to section 4 of a new subsection (c), the compensation standards of the Act (see §§ 4.159-4.179) were revised to impose on successor contractors certain requirements (see § 4.1b) with respect to payment of wage rates and fringe benefits *based on those agreed upon* for substantially the same services for the same location *in collective bargaining agreements* entered into by their predecessor contractors (unless such agreed compensation is substantially at variance with that locally prevailing or the agreement was not negotiated at arm's length). *The Secretary of Labor is to give effect to the provisions of such collective bargaining agreements in his wage determinations under section 2 of the Act.* * * * Other provisions of the 1972 amendments *include the addition of a new section 10 to the Act to insure extension of coverage by wage determinations of the Secretary to substantially all service contracts subject to section 2(a) of the Act at the earliest administratively feasible time*; an amendment to section 4(b) of the Act to provide, in addition to the conditions previously specified for issuance of administrative limitations, variations, tolerances, and exemptions (see § 4.123), *that administrative action in this regard shall be taken only in special circumstances where the Secretary determines that it is in accord with the remedial purpose of the Act to protect prevailing labor standards* * * *.

* * * *

[77055]

§ 4.123 Administrative limitations, variances, tolerances, and exemptions.

(a) *Authority of the Secretary.* Section 4(b) of the Act as amended in 1972 authorizes the Secretary to "provide such reasonable limitations" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (*other than § 10*), but only in special circumstances where he determines that such limitation, variation, tolerances, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business and is in accord with the remedial purpose of this Act to protect prevailing labor standards." This authority is *similar* to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3310).

* * * *

[77057]

§ 4.133 Beneficiary of contract services.

* * * *

(b) Because of some indication that members of Congress considered that a contract to operate a concession in a National Park for the purpose of furnishing food or lodging services to the general public, rather than to the Government or to personnel engaged in its business, should not be considered subject to the Act, the Department of Labor does not require the application of the Act to such contracts.

* * * *

[77061]

§ 4.163 Section 4(c) of the Act.

(a) Section 4(c) of the Act provides that no "contractor or subcontractor under a contract, which succeeds a

contract subject to this Act and under which substantially the same services are furnished shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective bargaining agreement as a result of arm's-length negotiations, to [77062] which such service employees would have been entitled if they were employed under the predecessor contract: Provided, that in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." *Under this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective-bargaining agreement (i.e., irrespective of whether the successor's employees were or were not employed by the predecessor contractor).* The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.

(b) *Section 4(c) is self-executing. Under section 4(c), a successor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which the predecessor contractor paid* (sic) pursuant to a collective bargaining agreement. *This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement.* * * *

* * * * *

(d) Sections 2(a) and 4(c) must be read in conjunction. The Senate report accompanying the bill which amended the Act in 1972 states that 'Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme.' (S. Rept. 92-1131, 92nd Cong., 2nd Sess. 4.) Therefore, *since section 4(c) refers only to the predecessor contractor's collective bargaining agreement*, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement. The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract. 48 Comp. Gen. 22, 23-24 (1968). In addition, because section 2(a) only applies to covered contracts in excess of $2,500, the requirements of section 4(c) likewise apply only to successor contracts which may be in excess of $2,500. * * *

(e) The operative words of section 4(c) refer to 'contract' not 'contractor'. Section 4(c) begins with the language '[n]o contractor or subcontractor under a *contract, which succeeds a contract* subject to this Act' (emphasis supplied). Thus, the statute is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc. (See §§ 4.143-4.145). Further, since sections 2(a) and 4(c) must be read in harmony to reflect the statutory scheme, *it is clear that the provisions of section 4(c) apply whenever the Act or the regulations re-*

quire that a new wage determination be incorporated into the contract (53 Comp. Gen. 401, 404-6 (1973)).

* * * *

[77073]

4.187 Recovery of underpayments.

* * * *

[77074] (e) (i) * * *

[77075] (5) Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act. *Standard Fabrication Ltd*, Decision of the Secretary, PC-297, August 3, 1948; *Airport Machining Corp.*, Decision of the ALJ, PC-1177, June 15, 1973; *James D. West*, Decision of the ALJ, SCA 397-398, November 17, 1975; *Metropolitan Rehabilitation Corp.*, WAB Case No. 78-25, August 2, 1979; *Fry Brothers Corp.*, WAB Case No. 76-6, June 14, 1977.

* * * *

29 CFR Part 4

45 Federal Register 81785, December 12, 1980

[81785]

Labor Standards for Federal Service Contracts

AGENCY: Wage and Hour Division, Labor.

ACTION: Proposed rule. [all emphasis is added]

SUMMARY: The Department of Labor proposes to amend § 4.133 of its Regulations (29 CFR 4.133) to clarify the treatment of concession contracts under the Service Contract Act. An earlier proposed amendment of § 4.133 had been published in the Federal Register on December 28, 1979 at FR 77057. As a result of public comments received concerning this earlier proposed amendment and further evaluation of the matter by the Department of Labor, proposed paragraph (b) of § 4.133 has been further revised and clarified to (1) specifically list the types of concession contracts exempted from coverage of the Service Contract Act, (2) indicate that this exemption is not limited to National Park Service concession contracts but applies to qualifying concession contracts of other government agencies as well, and (3) indicate the types of concession contracts and bid specifications, including those of the National Park Service, which are not exempted from the Service Contract Act.

* * * *

SUPPLEMENTAL INFORMATION: Coverage of the Service Contract Act is broad. It encompasses all contracts, or any bid [81786] specifications therefor, entered into by and with the Government, which have as their principal purpose the furnishing of "services in the United States through the use of service employees." *Since 1968, the Department of Labor has excepted certain contracts from the Act's provisions pursuant to § 4.133. The Department's current regulation excepts from the Act's requirements those concession contracts which provide services*

of "indirect or remote" benefit to the Government, for example, National Park Service food and lodging concessionaires serving the general public. This regulation, which the Department has construed very narrowly, was based on comments by some members of Congress, made after the Act's passage, that the Act's requirements should not be imposed on concession contracts whose purpose was to serve the public as opposed to the Federal Government or its personnel.

However, difficulties were encountered in applying the language of 29 CFR 4.133, particularly in circumstances where both the Government and the public seem to benefit, or where it is difficult to determine how "indirect or remote" is the benefit to the Government. *Further, the regulation is susceptible of being misconstrued as providing that the Act itself does not cover a contract unless the services provided are of direct benefit to the Government.*

For these reasons, the Department of Labor proposed to recast the regulation. Paragraph (a) of this proposed regulation published earlier in the *Federal Register* (44 FR 77057), plainly established that all government concession service contracts, like all other government contracts for service, fall within the Act's scope, regardless of whom those contracts directly benefit; and paragraph (b) of the regulation previously proposed simply exempted from the Act's coverage those contracts to operate a concession in a National Park for the purpose of furnishing food or lodging to the general public.

Public comments concerning proposed paragraph (b) question whether there is a sufficient basis to treat concession contracts in National Parks differently from similar concession contracts involving other Federal agencies, and indicate the need for further clarification of which concession contracts are exempt from and which are covered by the Service Contract Act.

Consequently, the Department of Labor proposes to further revise paragraph (b) to make clear both the limits of the exemption and that the exemption applies to all qualifying government concession contracts for services. Therefore, the Department of Labor proposes to continue to exempt, *pursuant to its discretionary authority under 42 U.S.C. § 353(b), some kinds of concessionaire contracts.* Exempted are those contracts which provide food, lodging, automobile fuel, souvenirs, newspaper stands, or recreational equipment to the general public, as distinguished from the Government and its personnel. Where concession contracts include services other than those just stated, such as the maintenance of government buildings and grounds and the dissemination of information about government programs or facilities, those services are not exempt.

The Secretary of Labor has determined, based on the information available, that because the proposed regulation is supported by statements of members of Congress, it is necessary and proper in the public interest; and further that because the proposed regulation will clarify the limits and make clear the basis of the previous exemption, it is therefore in accord with its remedial purpose to protect prevailing labor standards.

In accordance with the foregoing, it is proposed that 29 CFR 4.133 be amended as set forth below.

§ 4.133 Beneficiary of contract services.

(a) The Act does not say to whom the services under a covered contract must be furnished. So far as its language is concerned, it is enough if the contract is "entered into" by and with the government and if its principal purpose is "to furnish services in the United States through the use of service employees". It is clear that Congress intended to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose needs it is neces-

sary or desirable for the government to make provision for such services. For example, the legislative history makes specific reference to such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations. Furthermore, there is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the Government, as distinguished from the general public, are subject to the Act. Therefore, where the principal purpose of the Government contract or any bid specification therefor is to provide services through the use of service employees, the contract is covered by the Act, regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. The fact that the contract requires or permits the contractor to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not negate coverage by the Act.

(b) *Because of comments made shortly after the Act's passage by some members of Congress that the Act's requirements should not be imposed on certain concession contracts providing services to the general public,* the Department of Labor, *pursuant to Section 4(b) of the Act,* exempts from the provisions of the Act *certain kinds of concession contracts as provided herein.* Specifically, concession contracts (such as those entered into by the National Park Service) for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands and recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt. Where concession contracts, however, include specifications for services other than those stated, such as the maintenance of government buildings

and grounds, and the dissemination of information about government programs or facilities, those services are not exempt. *Exemption of additional recreational or similar services under concession contract will be determined in the discretion of the Secretary on a case-by-case basis in accordance with 29 CFR 4.123 and section 4(b) of the Act.* The exemption provided does not affect a concession contractor's obligation to comply with the labor standards provisions of any other statutes such as the Contract Work Hours and Safety Standards Act, the Davis-Bacon Act (40 U.S.C. 276 *et seq.*; see Part 5 of this title) and the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*). This clarification and limitation of the exemption previously granted (33 FR 9880, July 10, 1968) is necessary and proper in the public interest and is in accord with the remedial purpose of the Act.

(Secs. 2(a) and 4, 79 Stat. 1034, 1035; 41 U.S.C. 351, 353, and under 5 U.S.C. 301)

Signed at Washington, D.C., this 9th day of December 1980.

Donald Elisburg,

Assistant Secretary, Employment Standards Administration.

29 CFR Part 4

46 Federal Register 4320, January 16, 1981
[all emphasis is added]

[4320]

Summary: * * * Most changes are made to reflect long-standing policies, rulings, and interpretations developed in the course of our experience in administering and enforcing the Act over the years. * * *

Supplementary Information:

[4323]

Section 4.5(c)—Failure to File SF-98 on a Timely Basis; Erroneous Contracting Agency Determinations of Non-coverage

* * * *

The listed court cases are generally cases in which the courts have required incorporation of contract provisions required by law or considered such provisions to be incorporated as a matter of law. The Department of Labor does not have the authority to require an agency to reimburse a contractor for additional costs resulting from the inclusion of a wage determination or for other related procurement costs. These are matters for resolution within the context of the applicable procurement statutes and regulations and GAO directives. *This section of the regulations sets out various possible alternative avenues of relief for the contracting agencies to consider and/or adopt so as to provide for equity to contractors while at the same time properly effectuating the remedial purposes of the SCA.*

* * * *

[4341]

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

* * * *

(c) (2) *Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting party*, within 30 days of notification by the Department of Labor, *shall include in the contract the stipulations contained in § 4.6 and any applicable wage determination issued by the Administrator* or his authorized representative through the exercise of any and all authority that may be needed (*including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination*). (*G.L. Christian & Associates v. U.S.*, 312 F.2d 418 (Ct. Cl. 1963), rearg. denied 320 F.2d 345, cert. denied 375 U.S. 954; (53 Comp. Gen. 412, (1973); *Curtiss-Wright Corp. v. McLucas*, 381 F.Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2 v. Military Sealift Command*, 86 CCH Labor Cases ¶ 33,782 (D DC 1979); *Brinks, Inc. v. Board of Governors of the Federal Reserve System*, 466 F.Supp. 112 (D DC 1979), 466 F. Supp. 116 (D DC 1979). (See also 32 CFR 1-403).

* * * *

§ 4.6 Labor standards clauses for Federal service contracts exceeding $2,500

* * * *

(b) (2) * * *

[4342]

(v) *Failure to pay such unlisted employees the compensation* * * * *finally determined by the Office of Government Contract Wage Standards retroactive to the date such class of employees commenced contract work shall be a violation of the Act and this contract:*

* * * *

(vii) *Failure by the contractor to comply with its responsibilities in sections (b)(2)(i) through (vi) of this section shall also be a violation of the Act and this contract. Upon discovery of such violation,* the Office of Government Contract Wage Standards *shall then make a final determination* of conformed classification, wage rate, and/or fringe benefits *which shall be retroactive to the date such class of employes commenced contract work.*

* * * *

[4348]

§ 4.54 Issuance and revision of wage determinations.

(a) Section 4.4 of Subpart A requires that the awarding agency file a notice of intention to make a service contract which is subject to the Act with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, prior to any invitation for bids or the commencement of negotiations for any contract exceeding $2,500. Upon receipt of the notice, the Office of Government Contract Wage Standards may issue a new determination of minimum monetary wages and fringe benefits for the classes of service employees who will perform work on the contract or may revise a determination which is currently in effect.

(b) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in revised determinations. For example, in a locality where it is determined that the wage rate prevails for a particular class of service employees is the rate specified in a collective bargaining agreement(s) applicable in that locality, and such agreement(s) specifies increases in such rates to be effective on specific dates, the determinations would be revised to reflect such changes as they become effective. Revised determinations shall be applicable to contracts in accordance with the provisions of § 4.5(a)(2) of Subpart A.

(c) Determinations issued by the Office of Government Contract Wage Standards with respect to particular contracts are required to be incorporated in the invitations for bids or requests for proposals or quotations issued by the contracting agencies, and are to be incorporated in the contract specifications in accordance with § 4.5 of Subpart A. *In this manner, prospective contractors and subcontractors are advised of the minimum monetary wages and fringe benefits required under the most recently applicable determination to be paid the service employees who perform the contract work.* These requirements are, of course, the same for all bidders so none will be placed at a competitive disadvantage.

* * * *

[4349]

§ 4.101 Official rulings and interpretations in this subpart

(a) The purpose of this subpart is to provide, pursuant to the authority cited in § 4.102, official rulings and interpretations with respect to the application of the McNamara-O'Hara Service Contract Act for the guidance of the agencies of the United States and the District of Columbia which may enter into and administer contracts subject to its provisions, the persons desiring to enter into such contracts with these agencies, and the contractors, subcontractors, and employees who perform work under such contracts.

(b) These rulings and interpretations are intended to indicate the construction of the law and regulations which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress *or by authoritative rulings of the courts,* or if it is concluded upon reexamination of an interpretation that it is incorrect. * * * The Department of Labor (and not the contracting agencies) has the primary and final au-

thority and responsibility for administering and interpreting the Act, including making determinations of coverage. See *Woodwide Village v. Secretary of Labor*, 611 F.2d 312 (9th Cir. 1980); *Nello L. Teer Co. v. United States*, 348 F.2d 533, 539-540 (Ct. Cl. 1965), cert. denied, 383 U.S. 934 (Davis-Bacon Act); *North Georgia Building & Construction Trades Council v. U.S. Department of Transportation*, 399 F. Supp. 58, 63 (N.D. Ga. 1975) (Davis-Bacon Act); *Zachry Co. v. United States*, 344 F.2d 352 (Ct. Cl. 1965) (Davis-Bacon Act); *Curtiss-Wright Corp. v. McLucas*, 346 F. Supp. 759, 769-72 (D.N.J. 1973); and 43 Atty. Gen. Ops.—(March 9, 1979); 53 Comp. Gen. 647, 649-51 (1974); 57 Comp. Gen. 501, 506 (1978).

(c) * * * *On matters which have not been authoritatively determined by the courts*, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). In order that these positions may be made known to persons who may be affected by them, *official interpretations and rulings are issued by the Administrator with the advice of the Solicitor of Labor*, as authorized by the Secretary (Secretary's Order No. 16-75, Nov. 21, 1975, 40 FR 55913; Employment Standards Order No. 2-76, Feb. 23, 1976, 41 FR 9016). * * *

(d) The interpretations of the law contained in this part are official interpretations which may be relied upon. * * *.

[4355]

§ 4.123 Administrative limitations, variances, tolerances, and exemptions.

(a) *Authority of the Secretary.* Section 4(b) of the Act as amended in 1972 authorizes the Secretary to "pro-

vide such reasonable limitations" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than § 10), but only in special circumstances where he determines that such limitation, variation, tolerances, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards." This authority is *similar* to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331).

* * * *

[4357]

§ 4.133 [Reserved]

* * * *

[4361]

§ 4.163 Section 4(c) of the Act.

(a) Section 4(c) of the Act provides that no "contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the [4362] foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for serv-

ices of a character similar in the locality." *Under this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaiinng agreement (i.e., irrespective of whether the successor's employees were or were not employed by the predecessor contractor).* * * *

(b) *Section 4(c) is self-executing. Under section 4 (c), a successor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which the predecessor contractor paid* pursuant to a collective bargaining agreement. *This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement.* * * *.

(c) *Variance hearings.* The regulations and procedures for hearings pursuant to section 4(c) of the Act are contained in § 4.10 of Subpart A and Part 6 of this title. If, as the result of such hearing, some or all of the wage rate and/or fringe benefit provisions of a predecessor contractor's collective bargaining agreement are found to be substantially at variance with the wage rates and/or fringe benefits prevailing in the locality, the Administrator will cause a new wage determination to be issued in accordance with the decision of the Administrative Law Judge or the Secretary. Since "it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved" (53 Comp. Gen. 401, 492, 1973), the solicitation, or the contract if already awarded, must be amended to incorporate the newly issued wage determination. Such new wage determination shall be made applicable to the contract as of the date of the Administrative Law

Judge's decision or as of the date of the decision of the Secretary. The legislative history of the 1972 Amendments makes clear that the collectively bargained "wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after a hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services" (S. Rept. 92-1131, 92nd Cong., 2d Sess. 5). Thus, variance decisions do not have application retroactive to the commencement of the contract.

(d) *Sections 2(a) and 4(c) must be read in conjunction.* The Senate report accompanying the bill which amended the Act in 1972 states that "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme." (S. Rept. 92-1131, 92nd Cong., 2nd Sess. 4) Therefore, *since section 4(c) refers only to the predecessor contractor's collective bargaining agreement, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement.* * * *

(e) *The operative words of section 4(c) refer to "contract" not "contractor".* Section 4(c) begins with the language, "[n]o contractor or subcontractor under a *contract, which succeeds a contract* subject to this Act" (emphasis supplied). Thus, the statute is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc. (See §§ 4.143-4.145). Further, since sections 2(a) and 4(c) must be read in harmony to reflect the statutory scheme, it is clear that the provisions of section 4(c) apply whenever the Act or the regulations require that a new wage determination be

incorporated into the contract (53 Comp. Gen. 401, 404-6 (1973)).

* * * *

[4363]

(j) *Interpretation of wage and fringe benefit provisions of wage determinations issued pursuant to sections 2(a) and 4(c). Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits* set forth in the predecessor's collective bargaining agreement. *However, failure to include in the wage determination any job classification, wage rate,* or *fringe benefit* encompassed in the collective bargaining agreement *does not relieve the successor contractor of the statutory requirement to comply at a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned.* Since the successor's obligations are governed by the terms of the collective bargaining agreement, any interpretation of the wage and fringe benefit provisions of the wage determination must be based on the intent of the parties to the collective bargaining agreement to the extent that such interpretation is not violative of law. * * *

(k) *No provision of this section shall be construed as permitting a sucessor contractor to pay its employees less than the wages and fringe benefits to which such employees would have been entitled under the predecessor* contractor's collective bargaining agreement. * * *

[4373]

§ 4.187 Recovery of underpayments.

* * * *

[4374] (b)(2) Since section 3(a) of the Act provides that accrued contract funds withheld to pay employees wages must be held in a deposit fund, it is the position of the Department of Labor that monies so held may not be used or set aside for agency reprocurement costs. To

hold otherwise would be inequitable and contrary to public policy, since the employees have performed work from which the Government has received the benefit (see *National Surety Corporation v. U.S.*, 132 Ct. Cl. 724, 728, 135 F. Supp. 3891 (1955), cert. denied, 350 U.S. 902), and to give contracting agency reprocurement claims priority would be to require employees to pay for the breach of contract between the employer and the agency. * * *

* * * *

(d) Releases or waivers executed by employees for unpaid wages and fringe benefits due them are without legal effect. As stated by the Supreme Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, (1945), arising under the Fair Labor Standards Act.

"Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."

See also *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946); *United States v. Morley Construction Company*, 98 F.2d 781 (C.A. 2, 1938), cert. denied, 305 U.S. 651.

* * * *

[4375]

(e)(2) *The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer* charged by reason of his or her corporate office while performing that duty. *United States v. Sanolmar Industries, Inc.*, 347 F.Supp. 404, 408 (E.D. N.Y. 1972). Accordingly, it has been held by administrative decisions and by the courts that the term "party responsible", as used in section 3(a) of the Act, *imposes personal liability for violations of any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers who control, or are responsible for control of, the corporate entity, as they, individually,*

have an obligation to assure compliance with the requirement of the Act, the regulations, and the contracts.

* * * *

(5) *Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act. Standard Fabrication Ltd.*, Decision of the Secretary, PC-297, August 3, 1948; *Airport Machining Corp.*, Decision of the ALJ, PC-1177, June 5, 1973; *James D. West*, Decision of the ALJ, SCA-397-398, November 17, 1975; *Metropolitan Rehabilitation Corp.*, WAB Case No. 78-25, August 2, 1979; *Fry Brothers Corp.*, WAB Case No. 76-6, June 14, 1977.

* * * *

29 CFR Part 4

46 Federal Register, January 21, 1981
[All emphasis is added]

[5876]

* * * *

Action: Final rule.

Summary: This rule revises § 4.133 of the regulations of the Department of Labor (29 CFR 4.133) to clarify the treatment of concession contracts under the Service Contract Act. Subsection (a) of the revised regulation makes it clear that *government concession contracts, like all other government contracts for services, are covered by the Act.* Subsection (b) *indicates the types of concession contracts the Secretary of Labor is exempting from the Act's coverage* pursuant to his authority under Section 4(b) of the Service Contract Act.

Effective Date: February 18, 1981.

[5877]

SUPPLEMENTARY INFORMATION: * * * NASA and FAA contended that the Act was intended to cover only concession contracts which are of a direct benefit to the Government or its personnel, and was not intended to cover concession contracts which primarily benefit the general public.

However, these contentions must be rejected. As previously noted the language of the Act is very broad and covers all contracts the principal purpose of which is furnishing services. The Act's language makes no distinction based on the beneficiary of the contract services. In addition, the legislative history of the statute provides no evidence of a Congressional intent to limit coverage to service contracts of direct benefit to the Government. Comments by members of Congress that the Act should not be applied to certain concession contracts providing services to the general public were made after the pas-

sage of the Act, and do not constitute part of the statute's legislative history.

* * * *

NASA submitted additional comments again contesting the interpretation of the Act found in § 4.133 that concession contracts which provide services of indirect or remote benefit to the Government are covered by the Act. *NASA expressed concern with the possible effect this proposed regulation might have on the status of a pending lawsuit,* and recommended that the proposed regulation be held in abeyance until the court rules in the case. However, in light of the real need for clarification of the position of the Department of Labor concerning the application of the Service Contract Act to government concession contracts, and the fact that it has been over a year since publication of the proposed revision of the regulation, the Department of Labor feels it would not be in the public interest to further delay publication of the regulation as a final rule.

The Secretary of Labor has determined, based on the information available, *that because the proposed exemption is supported by statements of members of Congress, it is necessary and proper in the public interest;* and further that because the proposed regulation will clarify the limits and make clear the basis of the previous exemption, it is therefore in accord with its remedial purpose to protect prevailing labor standards.

* * * *

Accordingly, 29 CFR § 4.133 is revised as set forth below:

§ 4.133 Beneficiary of contract services.

(a) The Act does not say to whom the services under a covered contract must be furnished. So far as its language is concerned, it is enough if the contract is "entered into" by and with the government and if its

principal purpose is "to furnish services in the United States through the use of service employees". It is clear that Congress intended to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose needs it is necessary or desirable for the government to make provisions for such services. For example, the legislative history makes specific reference to such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations. Furthermore, there is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the Government, as distinguished from the general public are subject to the Act. Therefore, where the principal purpose of the Government contract or any bid specification therefor is to provide services through the use of service employees, the contract is covered by the Act, regardless of the direct beneficiary of the services or the source [5878] of the funds from which the contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. The fact that the contract requires or permits the contractor to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not negate coverage by the Act.

(b) *Because of comments made shortly after the Act's passage by some members of Congress that the Act's requirements should not be imposed on certain concession contracts providing services to the general public,* the *Department of Labor, pursuant to Section 4(b) of the Act, exempts from the provisions of the Act certain kinds of concession contracts as provided herein.* Specifically, concession contracts [such as those entered into by the National Park Service] for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands and

recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt. Where concession contracts, however, include specifications for services other than those stated, *such as the maintenance of government buildings and grounds, and the dissemination of information about government programs or facilities, those services are not exempt. Exemption of additional recreational or similar services under concession contract will be determined in the discretion of the Secretary on a case-by-case basis in* accordance with 29 CFR 4.123 and *section 4(b) of the Act.* * * *

46 Federal Register, August 14, 1981

[all emphasis is added]

[41380]

29 CFR Part 4

* * * *

[41382]

* * * *

Section 4.133(b) would be revised to *include visitor information services within the exemption for concessionaires serving visitors to Federal facilities*, such as those of the National Park Service. Another proposed revision would permit inclusion of incidental requirements, such as maintenance of Government property, in exempt concession contracts, but would provide that substantial requirements other than those activities stated would not be within the exemption.

* * * *

[41405]

4.133 (Beneficiary of contract services.)

(a) The Act does not say to whom the services under a covered contract must be furnished. So far as its language is concerned, it is enough if the contract is "entered into" by and with the Government and if its principal purpose is "to furnish services in the United States through the use of service employees". It is clear that Congress intended to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose need it is necessary or desirable for the Government to make provision for such services. For example, the legislative history makes specific reference to such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations. Furthermore, there is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the

Government, as distinguished from the general public, are subject to the Act. Therefore, where the principal purpose of the Government contract is to provide services through the use of service employees, the contract is covered by the Act, regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, or a Government installation, or elsewhere. The fact that the contract requires or permits the contractor to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not negate coverage by the Act.

(b) *Because of comments by some Members of Congress that the Act's requirements should not be imposed on certain concession contracts providing services to the general public, the Department of Labor, pursuant to Section 4(b) of the Act, exempts from the provisions of the Act certain kinds of concession contracts as provided herein.* Specifically, concession contracts (such as those entered into by the National Park Service) for the furnishing of food, lodging, automobile fuel, *visitor information services*, souvenirs, newspaper stands, and recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt. Where concession contracts, however, include substantial requirements for services other than those stated, those services are not exempt. Exemption of additional recreational or similar services under concession contracts principally for services for visitors at Federal facilities will be determined in the discretion of the Secretary on a case-by-case basis in accordance with 29 CFR 4.123 and section 4(b) of the Act. * * * This clarification and limitation of the exemption previously granted (33 FR 9880, July 10, 1968) is necessary and proper in the public interest and is in accord with the remedial purpose of the Act.

* * * *

29 C.F.R. PART 4

48 F.R. 49761-49762

LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

[all emphasis is added]

Note: The President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), directed Federal agencies to postpone for sixty days from January 29, 1981, the effective date of all regulations that they had promulgated in final form and had scheduled to become effective during such sixty day period.

Part 4 was revised at 46 FR 4337, Jan. 16, 1981, and the effective date subsequently postponed. For further explanation, see the appendix in the Findings Aids section of this volume. [Effective date Jan. 27, 1984].

* * * *

§ 4.1a The Act as amended.

(a) * * * By virtue of amendments made to paragraphs (1) and (2) of section 2(a) and the addition to section 4 of a new subsection (c), the compensation standards of the Act (see §§ 4.159-4.164) were revised to impose on successor contractors certain requirements (see § 4.1c) with respect to payment of wage rates and fringe benefits based on those agreed upon for substantially the same services for the same location in collective bargaining agreements entered into by their predecessor contractors (unless such agreed compensation is substantially at variance with that locally prevailing or the agreement was not negotiated at arm's length), and to require the Secretary of Labor to give effect to the provisions of such collective bargaining agreements in his wage determinations under section 2 of the Act. * * *

§ 4.1b Definitions and use of terms.

(a) * * *

(2) Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage

Standards is the authorized representative of the Administrator for the performance of functions relating to the making and effectuation of wage determinations under the Service Contract Act of 1965, as amended, and this part.

* * * *

§ 4.1c Payment of minimum compensation based on collective bargained wage rates and fringe benefits applicable to employment under predecessor contract.

(a) *Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished for the same location.* Section 4(c) provides that no such contractor or subcontractor shall pay any employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such services employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement.
* * *

§ 4.4 Notice of intention to make a service contract.

(a) Not less than 30 days prior to any invitation for bids, request for proposals, or commencement of negotiations for any contract exceeding $2,500 which may be subject to the Act, the contracting agency shall file with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. Such notice shall be submitted on Standard Form 98, Notice of Intention to Make a

Service Contract, which shall be completed in accordance with the instructions provided and shall be supplemented by the information required under paragraphs (b) and (c) of this section. * * *

(c) If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits the the subject of one or more collective bargaining agreements, the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. * * *

* * * *

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

(c) *If the notice of intention required by § 4.4 is not filed with the required supporting documents within the time provided in such section, the contracting agency shall exercise any and all of its power that may be needed (including, where necessary,* its power to negotiate, *its power to pay any necessary additional costs,* and its power under any provision of the contract authorizing changes) to include in the contract any wage determinations communicated to it within 30 days of the filing of such notice or of the discovery by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, of such omission.

§ 4.6 Labor standards clauses for Federal service contracts exceeding $2,500.

* * * *

(2) *Failure to pay such employees the compensation agreed upon by the interested parties or finally deter-*

mined by the Administrator or his authorized representative shall be a violation of this contract. * * *

(d) (2) If this contract succeeds a contract, subject to the Service Contract Act of 1965, as amended, under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, then *in the absence of a minimum wage attachment for this contract* neither the contractor nor any subcontractor under this contract shall pay any service employee performing any the contract work less than the wages and fringe benefits, provided for in such collective bargaining agreements, to which such employee would be entitled if *employed under the predecessor contract, including accrued wages and fringe benefits provided for under such agreement.* * * *

§ 4.10 Provisions for hearing.

(a) *Statutory provision.* Under section 4(c) of the Act, and under wage determinations made as provided in section 2(a) (1) and (2) of the Act, *contractors and subcontractors performing certain contracts subject to the Act may be obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would be entitled if they were employed on like work under a predecessor contract* for which the wages and fringe benefits of service employees were governed by a collective bargaining agreement. (See §§ 4.1a, 4.1c, 4.3(b), 4.6(b), 4.6(d) (2).)

4.101 Official rulings and interpretations in this subpart.

* * * This subpart supersedes all prior rulings and interpretations issued under the act to the extent, if any, that they may be inconsistent with rules herein stated. * * *

§ 4.111 Contracts "to furnish services".

(a) *"Principal purpose" as criterion.* Under its terms, the Act applies to a "contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services * * *". * * *

§ 4.133 Government as beneficiary of contract services.

(a) * * * The legislative history indicates an intention to cover at least contracts for services of direct benefit to the Government * * *. The fact that the contract permits him to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not require a different conclusion.

(b) *Special situations.* It is not considered that the Act was intended to cover every contract, however, which is entered into with the Government by a contractor to furnish services, no matter how indirect or remote a benefit the Government may derive therefrom. *If, for example, a contract with the Government grants the contractor the privilege of operating as a concessionaire* in a Government park for the purpose of furnishing services to the public generally rather than to the Government or to personnel engaged in its business, *the contract is not considered subject to the Act. Since the statute itself provides no clear line of demarcation, questions of contract coverage where doubt arises because of remoteness of benefit to the Government from the services to be furnished should be referred to the Office of Government Contract Wage Standards, for resolution.*

* * * *

§ 4.164 Making the determinations and informing contractors.

* * * *

(b) * * *

(2) The regulations, in § 4.4, provide for the filing with the Office of Government Contract Wage Standards,

Wage and Hour Division, Employment Standards Administration, by the awarding agency, prior to any invitation for bids or the commencement of negotiations for contracts exceeding $2,500, of a notice of intention to make a service contract which is subject to the Act. Upon receipt of the notice that Office may make a determination of minimum monetary wages and fringe benefits for the classes of service employee who will perform on the contract or may revise a determination which is currently in effect.

(c) * * * Contractors and subcontractors on contracts subject to the Act are apprised of the Secretary's determinations applicable at the time of the award by specification in the contract of the determined wage rates and fringe benefits. (See § 4.6(b)). *A determination of prevailing wages or fringe benefits made after the date of the contract award for classes of employees that will be used in performing the contract does not apply to the performance of the previously awarded contract.* * * *

§ 4.165 Wage payments and fringe benefits—in general.

(a)(1) *Monetary wages specified under the Act shall be paid to the employees to whom they are due, promptly following the end of the pay period in which they are earned.* No deduction, rebate, or refund is permitted, except as hereinafter stated. * * *

[COMMITTEE PRINT]

THE PLIGHT OF SERVICE WORKERS UNDER GOVERNMENT CONTRACTS

REPORT

OF THE

SPECIAL SUBCOMMITTEE ON LABOR

OF THE

UNITED STATES CONGRESSIONAL HOUSE

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

[SEAL]

JUNE 1971

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THE PLIGHT OF SERVICE WORKERS UNDER GOVERNMENT CONTRACTS

I. PURPOSE OF THE HEARINGS

The Service Contract Act of 1965 was enacted with a dual purpose.

First, it was intended to provide wage and safety protections for the several hundred thousand employees working under Government service contracts. Second, it was intended to provide some degree of stability in labor-management relations where Government service contracts were involved; cutthroat competition and the abuse of employees were not uncommon in this field since labor costs account for most of the costs in a contract, and the contractor is, in effect, "a labor broker."

When this subcommittee reported out the Service Contract Act in 1965, and when it was enacted by the Congress, we were confident that we had brought into being an effective vehicle for reaching our objective. We were aware of the successful operation of the Davis-Bacon Act and the Walsh-Healey Act in protecting employees under Government construction contracts and Government supply contracts, and we modeled the Service Contract Act on those two acts. We wanted to be sure we had a time tested vehicle because we were trying to protect employees who were in many cases on the lowest rungs of the economic ladder: laundry workers, busboys, dishwashers, guards, janitors and other workers performing housekeeping functions.

The essence of the act is that employees must be paid at least the prevailing wages and fringe benefits for similar work in their locality, and protected from unsafe working conditions. Contractors violating the act are placed on an ineligible bidders list, or blacklisted, for 3 years, unless the Secretary of Labor otherwise recommends.

The Labor Department was given the responsibility of administering the act.

Spurred by the Legislative Reorganization Act of 1970, which emphasized the responsibility of congressional committees to conduct legislative oversight, we decided to review the way in which the Service Contract Act had been administered since 1965, and whether it was meeting the objectives we had set for it. We had in addition been receiving disquieting reports for several months that all was not well, and the subcommittee decided to make this review its first order of business for the 92d Congress.

Five days of hearings were held between March 30 and May 5, 1971, and a large body of testimony and supporting information was received. The problems uncovered were so complex and far-reaching that additional hearings may have to be held later in the year. Notwithstanding, the subcommittee now has enough evidence to reach some firm conclusions about the effectiveness of the act and the actions of several Government agencies involved in its operation, and presents this interim report.

II. FINDINGS AND CONCLUSIONS

The subcommittee found that the act is being so interpreted and so administered as to substantially thwart the intent of the Congress in enacting it.

Chaos reigns in the Government service contracting industry as a result of recent administrative decision by the Department of Labor, and moves by several Government agencies, notably the Air Force, *NASA* and the Post Office, *to cut the wages of service contract workers.* We detail these actions in the body of this report.

The subcommittee believes that, failing corrective action by the agencies involved, which we suggest at various points in this report, new legislation will have to be enacted to tighten up the Service Contract Act of 1965.

Although this act could frequently achieve its purposes as now written, *it is, in its present operation, generating the same intolerable conditions that we thought we were correcting in 1965.*

III. HISTORICAL BACKGROUND

> Service employees were primarily the poor and unwanted of this earth—the disadvantaged, the minorities working in manual unskilled and semiskilled occupations, at abominable wages without any fringe benefits, without any seniority rights or job security, without any voice whatsoever in their destiny, pressed down by this vicious system of low wage competition. The employers were nothing more nor less than "labor brokers."
>
> Robert J. Connerton, Hearings, page 23.

Unlike the construction industry and the supply industry, contractors in the service industry need little plant and equipment and are highly mobile. The Government furnishes the facilities, and the contractor furnishes the guards, maids, janitors, dishwashers, cooks, busboys and so on. Wages account for almost all of the service contractor's costs.

Since the Government invariably accepts the lowest bid when letting service contracts, and labor costs are the dominant costs, contractors have an incentive to bid in with the lowest possible wage scales. * * *

> Prior to the act government agencies awarded service contracts to the low bidding contractor regardless of the wages and conditions that the contractor's employees would have to work under. Contractors would come from out of a locality, underbid a contractor paying the locality's prevailing wage and thereby destroy a decent working condition and the quality of the work performed.
>
> Thomas R. Donahue, Hearings, page 106.

* * * *

V. THE PROSPECTIVE WAGE INCREASE DECISION

> By adopting this clever, artificial interpretation, the Department of Labor on thousands of Federal installations has imposed a wage freeze—in perpetuity, apparently as their contribution in the fight against inflation—and all at the expense of the marginal workers who need a workable prevailing wage system the most. It is a bitter commentary on our times that a prevailing wage statute has been converted by an unsympathetic administration into a wage freeze statute.
>
> Robert J. Connerton, Hearings, page 25.

* * * *

2. THE COMPTROLLER GENERAL'S DECISION AND THE LABOR DEPARTMENT'S NEW POLICY

On September 19, 1969, the Comptroller General ruled that prospective wage increases could no longer be taken into account in making wage determinations under the Service Contract Act, citing their previous interpretation of the Davis-Bacon Act:

> We are aware of no authority for considering as "prevailing" a rate which is not in fact being paid at the time a contract specification is advertised in a solicitation of bids, however definite the belief may be that it will thereafter become the prevailing rate.
>
> 47 Comp. Gen. 754, Hearings, page 86.

The Department of Labor promptly accepted the Comptroller General's ruling, and, on December 10, 1969, announced that wage determinations would be made only on the basis of wages actually being paid at the time the determination is made.

The subcommittee has several criticisms to offer.

First, the Department of Labor did not resist the GAO's opinion, although it had flatly refused to accept GAO's opinion on other issues affecting Government procurement contracts, most notably the Philadelphia plan. This in spite of the opinion's potential for wreaking havoc in the service industry and thwarting the intent of Congress.

> It is my opinion that the Comptroller General is wrong, and that the Department should have as vigorously opposed his opinion in this matter as they have in others. Failing in that effort, if indeed they had, I think it was incumbent upon the Department to suggest the legislative remedy which would guarantee the protections of service workers intended by the framers of the McNamara-O'Hara Service Contract Act.
>
> Thomas R. Donahue, Hearings, page 107.

Second, the decision is a classic example of the remote decisionmaker, blinders in place, impervious to the pattern of collective bargaining in the service industry, arriving at a narrow, technical interpretation of the meaning of prevailing rate which would completely frustrate the intent of Congress in passing the act.

> The whole business of playing with the word "prevailing" and whether it means today or tomorrow, prevailing is a perversion of the clear intent of the statute. * * *
>
> Thomas R. Donahue, Hearings, page 112.

> Obviously, again, this is not what Congress had in mind and I am sure that the concept of prevailing wage was not meant to be a static concept, that it was meant to take into account the realities of collective bargaining. * * *
>
> Stanley Gruber, Hearings, page 64.

Third, the decision appears to us to be wrong on the merits. Anyone familiar with the cost-of-living index would find it difficult to believe that the cost of living on January 1, 1971, is what the cost of living is going to be on July 1, 1971, and that it will remain exactly that until July 1, 1972. And, when there is a stable collective bargaining pattern in a unique industry like the service industry, and the parties through arm's-length bargaining have agreed on wages and fringe benefits to commence with a new contract term, it is inconceivable that an interpretation of the term "prevailing rate" would not take this into account.

Finally, the Comptroller General cited the Department's own regulations as supporting his position. 29 CFR 4.164(b) reads in pertinent part:

> (b) Provision for consideration of currently prevailing wage rates and fringe benefits. (1) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in new determinations. In a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement or agreements applicable in that locality, and such agreement or agreements specify increases in such rates to be effective on specific dates, the prior determinations would be modified to reflect such changes when they become effective, and the revised determinations would apply to contracts entered into after the modification.

We suggest that if the Comptroller General had placed the emphasis on "would apply to contracts entered into," rather than after, he would have arrived at a different result.

3. The Results of the Comptroller General's Decision

The effect of the "no-prospective-wage increase" decision has been devastating on employer and employee alike. Here are some representative samples of the testimony we received.

> Mr. Franklin. There were 11 bidders at Fort Benning. All of them were sent telegrams and given this union contract that I have in my hand with the agreement between the cafeteria, snack bar, and post exchange employees union, AFL-CIO Local 731, and Quality Maintenance Co., Inc., which is out of Kansas City, Mo.
>
> This contract had been in effect for many months. The wages had been agreed upon. All parties who were bidding, not only those who bid but others who had received invitations were all notified that this contract would be in effect and wages and fringe benefits contained therein would be what would be paid.
>
> Ten companies, 10 companies bid to honor this contract. The reason that I say 10 companies bid to honor this contract is that we were second bidder and we had bid to honor it, so all of the others must have also.
>
> One company, Dynamic Enterprises, was lower than our bid.
>
> Now this comes about by the fact that the wage determination called for $1.74 an hour. The union contract at Benning called for $1.89 and $1.99 an hour.
>
> Mr. Thompson. You bid on the basis of $1.89 and $1.99?

Mr. FRANKLIN. Yes, $1.89 and $1.99. I am sure that the other 10 did also because they were within the price range much higher than Dynamic.

When Dynamic was awarded the contract, they said to the union, "We will recognize your union but we are not going to recognize the contract."

They didn't recognize the contract and I admire Mr. Race for holding out as long as he did until approximately the latter part of September as he probably received no dues from his members.

The employees were getting no protection and the union finally made a compromise agreement with Dynamic Enterprises for $1.74 an hour.

Mr. Happy Franklin, Hearings, page 36, 37.

Since the Department of Labor will only consider the rates actually being paid at the time it makes its determination, in this case in March or April, it must perforce use the rates negotiated by the Union which took effect on the preceding July 1. Accordingly, the wage and fringe benefit rates issued by the Department of Labor in March which will govern a service contract commencing on July 1 will be the same rates in effect on the preceding July 1. In short, there will be no increase for the employees and, if this result is followed to its logical conclusion, there can never be a wage or fringe benefit increase for employees.

Stanley Gruber, Hearings, page 61.

After all, industry has their regular wage increases, Civil Service employees have their regular wage increases, but under the Service Contract Act, if it was applied as some people feel it should be, we would never be able to get a wage increase that would be established by the Government and there

would be no need for bargaining. It would destroy unions because there would be no collective bargaining in this thing.

James McGahey, Hearings, page 130.

The Laborers' Union organized employees of Tri-Cities at the Norfolk Naval Base. The company had a contract from January 1970 to January 1971, with a predetermination of $1.85 plus $0.06 per hour fringe benefits. The union negotiated a contract which called for a wage increase to $1.88½ plus $0.06½ cents an hour fringe benefits and a modest future increase. The Department of Labor refused to recognize even the actual increases and in its determination of January 1, 1971, called for the January 1, 1970, rates of $1.85 plus $0.06.

Robert J. Connerton, Hearings, page 26.

Mr. FRANKLIN. What I tried to bring out just briefly in my report here or testimony was that we lost a number of contracts last year because we had contracts with the union that said you are going to pay a certain wage, you are going to pay so much holiday, you are going to pay so much sick leave.
* * *

H. I. Franklin, Hearings, Page 57.

The practical effect of the decision for unionized workers, except when every single bidder bids on the rate in the union contract, is that their wages are frozen at some point fixed in the past. Fly-by-night contractors have an incentive to come in and underbid established contractors, who are bound to honor their collective bargaining agreements. *We are once again approaching, through a failure to administer the act properly, the same chaotic conditions in the service industry that prompted us to pass the Service Contract Act in the first place.*

We note in passing the NLRB decision in the case of Emerald Maintenance, Inc., 188 NLRB No. 139. The Board, citing the no-prospective-wage-increase decision, carved out an exception to the successor doctrine of Burns International Detective Agency, 182 NLRB No. 50, and held that successor contractors did not have to honor their predecessor's collective bargaining contracts, in Government Service contracts only.

The successor doctrine would have protected service workers in spite of the no-prospective-wage-increase decision, by requiring successor employers to honor existing collective bargaining agreements and the wage and fringe benefits specified in them. This last protection has now been placed in doubt by the NLRB and recent judicial discussions.

* * * *

4. Possible Legislative Action

In view of the opposed contentions that prospective wage increases can or cannot be properly regarded as prevailing rates under the act, it may be advisable that the Congress address itself to the possibility of amending the act *to make it clear that prospective wage rates provided for in a bona fide collective bargaining agreement be included in the concept of the prevailing rate that Government service contractors are required, as a minimum, to pay their employees.*

VI. THE BLACKLISTING PROVISIONS

Section 5(a) of the Service Contract Act imposes a blacklisting penalty on contractors violating the act:

> Sec. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this act. Unless the Secretary otherwise

> recommends, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the name of such persons or firms.

Although we intended this debarment provision to be virtually automatic, with discretion in the Secretary of Labor to grant relief in unusual cases, we discovered during the course of the hearings that debarment has become the exception rather than the rule.

In fiscal year 1970, the Department of Labor made 1,874 investigations under the Service Contract Act and found that 13,570 workers had been underpaid $1,463,872. Yet only five contractors were placed on the debarment list in 1970, and only 21 firms currently appear on the 3-year list.

The reason is that the Department of Labor almost always grants relief if the violating firm will pay back to its employees the amount the Labor Department can prove it has cheated them out of. These investigations are expensive and difficult and the amounts are almost always compromise amounts.

A contractor witness described the process:

> It rather boils down to the fact that a contractor willing, as you say, that the wage determination may be $2 or whatever, and they decide they will pay less than that.
>
> Based on previous happenings of this type, many contractors have been allowed to do this and when caught by the Labor Department, they know that the Labor Department does not have unlimited amounts of people to go and investigate these violations.

> They conveniently misplace records. Employees are no longer employed and cannot be located to substantiate these violations. After this goes on for numerous months, the Labor Department then decides to make what you might consider a settlement of this situation which ultimately means that if a contractor in fact owes his employees $100,000, he possibly may only have to refund $50,000 of this money which clearly gives him a $50,000 profit.
>
> It is as simple as that. * * *
>
> Mrs. Frances Franklin, Hearings, page 39.

Although the Department of Labor believes that its frequent use of the relief provisions operates to spur contractors to pay moneys back to employees which they would otherwise not repay, the subcommittee has concluded that *as presently administered section 5(a) gives dishonest contractors a clear incentive to cheat their employees. He may not get caught, and if he is caught, the Department of Labor will have difficulty proving the amounts he owes his employees. He* then *settles out, is never in danger of being blacklisted, and goes on bidding on other Government contracts and perhaps violating the act anew.*

* * * *

When the Undersecretary of Labor testified before us on April 6, 1971, the Secretary of Labor had not yet made any decision in the case. In fact, he had before him a recommendation from the Workplace Standards Administrator that the firm not be debarred. No decision has been made as of the date of this report.

This contractor continues to bid on and receive Government contracts in spite of repeated violations of the act. It is the same company mentioned by Mr. Franklin in part V of this report as having under bid his company and nine others recently at Fort Benning, Ga.

Violations of the Service Contract Act are apparently widespread, more so than we had imagined. The act's blacklisting provisions are being unwittingly administered so as to encourage violations of the law.

The Labor Department points out that the blacklisting provision of the act is virtually identical with the provision (section 3) of the Walsh-Healey Public Contracts Act which has been on the statute books for many years, and both provisions are being administered in similar fashion. Nevertheless, it would appear that the Walsh-Healy provision has been far more effective in deterring contractors from violating that act, and relief for employees whose rights under it have been violated has been far more effective than has been the case under the Service Contracts Act.

This contrast in results may well be due to the disparity in the economic strength of the different types of workers who are employed in contracts covered by the two different acts. Those under the Service Contracts Act are less well organized, are disproportionately recruited from among the minority groups, and are, in large part, unskilled workers. They are not nearly as well situated to protect their own interests as are workers employed under Walsh-Healy contracts.

We therefore believe that the blacklisting provision of the McNamara-O'Hara Service Contracts Act should be more expeditiously and rigorously applied, such application being clearly within the authority of the Secretary of Labor under the language of the statute. We trust that the foregoing considerations and the evidence developed during the hearings as to the intent of the Congress in putting section 5(a) into the act and the actual effect of its current application will encourage the Labor Department to strengthen its methods for applying the blacklist provisions to violators of the act.

VII. CAPE KENNEDY:
A BITTER CASE HISTORY

> It is kind of hard to tell a man that he is going to take home 50 percent of the wages that he previously took home for the same job.
>
> Senator Lawton Chiles, Hearings, page 205.

TWA has been furnishing support services under contract to NASA at the Kennedy Space Center since early 1964, and had maintained a consistent excellence under NASA's evaluation system. NASA decided to recompete the contract in 1970 as part of a general policy of recompeting its service contracts.

Several companies bid. TWA's bid was rated the highest in the scoring system and received an excellent. Pan Am was second rated but its bid was rejected because of "potential labor strife." Boeing was middle bidder in terms of cost—$20 million as against TWA's $24 million —accounted for by wage cuts they proposed to make, and had received a good on the scoring system. NASA awarded the contract to Boeing, apparently because of its lower costs.

Then the wage cuts began, for blue-collar and white-collar worker alike. Boeing refused to recognize TWA's existing collective bargaining agreement with a Machinists local, covering 1,100 workers. *Legal arguments raged about the successor doctrine* and whether the 1,100 employes accreted to a different Machinists local embracing a different category of Boeing workers.

In any event, Boeing offered jobs to the existing employees at wage cuts ranging up to 50 percent, while actively recruiting around hard-pressed Brevard County, a high-unemployment area. As we issue this report, all but 200 of the 1,100 blue-collar workers are out of their jobs; the 200 swallowed substantial wage cuts. White-

collar workers were given this choice: take a substantial salary cut or leave. Many of them left; others swallowed their pride and took the cuts. Many were not offered reinstatement at all.

The hearing record details the bitterness and tragedy left in the wake of the events at Cape Kennedy and we will not go into them here: the degradation of a proud group of workers, mass relocations, mortgage foreclosures, employees with 7 years' service whose pension rights were wiped out because they did not vest for 3 more years. What we want to know is why, in 1971, there could have been allowed to happen what a Machinists Union general vice-president called "as calloused and capricious a demonstration of Federal executive power as we have ever confronted." (William Winpisinger, Hearing, p. 213.)

From the evidence we have so far it appears that *NASA, faced with cutbacks in some programs, deliberately set out to cut the costs of support services by becoming in their words "actively engaged in recompeting support service requirements." The only way to cut costs in their service contracts was to either reduce the number of employees involved or cut their wages.*

Since most of the employees involved were unionized, there were two obstacles (1) the Service Contract Act's requirement that wage determinations be made to protect employee wages, and (2) the successor doctrine of the Burns case, holding that successor contractors would have to honor the terms of the employees' existing collective bargaining agreement—these events occurred before the *Emerald Maintenance* case.

The first obstacle proved to be no obstacle at all, since the Department of Labor issued wage determinations for only 100 employees at Cape Kennedy. These 100 were janitorial workers, and the incumbents were earning an

average of $3.85 per hour plus fringe benefits; the *wage determination was set at $2.45 per hour plus fringe benefits.* The reasons for this low determination and the absence of any determination for the other employees are still not clear, but in any event that protection was not there.

Boeing ignored the successor doctrine of Burns in its bid, and NASA apparently regarded the Cape Kennedy contract as a test of whether they would be bound by the successor doctrine in recompeting their other contracts.

> Senator CHILES. This is only one contract, and many of them are coming up for renewal. NASA said maybe we picked the wrong place with this contract to determine whether the successor—and this is a test. I think by NASA to determine whether they are bound to accept the existing wage thing.
>
> But they intimated to me that maybe they picked the wrong place to test this, and maybe they should have gone out on the desert where it didn't involve any employees and test it out there.
>
> Hearings Record, page 204.

The Comptroller General issued an opinion on February 26, 1971, upholding the award of the contract to Boeing. The opinion noted that "NASA's industrial relations officer expressed the opinion that no major labor problems would seem to be associated with Boeing's basic proposal," and that Pan Am's proposal had been turned down because it was "likely to involve serious labor problems." The Comptroller General dismissed the successor doctrine of the *Burns* case as not authoritative since it had not involved services at a Government installation. Finally, the Comptroller General noted that the award to Boeing was conditioned on a "showing by Boeing of firm agreements with the appropriate unions providing coverage for the work to be performed under the proposed contract." (Hearings, page 264 et. seq.)

There is a tangle of factual and legal issues we do not propose to go into here, although they are set out to some extent in the hearing record. The Machinists Union has filed unfair labor practice charges against Boeing, and the NLRB and the courts will decide whether Boeing had technically reached firm agreements with the appropriate unions. NASA's opinion that the selection of Boeing would involve "no major labor problems" was clearly wrong. The Comptroller General's dismissal of the *Burns* case as not authoritative seems questionable since the *Emerald Maintenance* case, which carved out an exception to the successor doctrine, had not yet been decided by the NLRB.

What is very clear is that NASA deliberately set out to cut the wages of service workers, and the protections of the Service Contract Act were unavailable because of nonfeasance on the part of the Department of Labor.

We have singled out the case of Cape Kennedy because it has become a tragic symbol of what is happening to service employees at the hands of unsympathetic Government officials.

> Mr. O'HARA. I think the situation you have brought to our attention today * * * is a classic example of the damage that can be done to a community and to its citizens by these violations of the spirit and intent of the Service Contract Act.
>
> That is what I have to call them, because I think you can make an argument, as, indeed, some have made an argument before this subcommittee, to the effect that the law isn't being violated but the spirit of the law is certainly being violated. What we intended to do was to protect service contract employees, to enhance their wages, to permit them to obtain some job security and attain decent living standards for themselves and their families.

We never intended when we enacted this legislation back in the 89th Congress that we would see the kind of situation that you have described; people thrown out of their jobs or asked to take a wage cut in the neighborhood of 50 percent at the same time that others at that installation are getting wage increases.

Hearings, page 209.

Mr. THOMPSON. *We have seen evidence in cases from all over the United States of what is essentially a failure in the administration of the Service Contract Act.* It happens to be a huge installation and a particularly tragic and bitter situation at Cape Kennedy for a variety of reasons, but the same thing exists at other bases.

Hearings, page 208.

VIII. THE REMOTENESS OF GOVERNMENT

* * * *

Our hearings have shown an apathetic and at times unsympathetic Labor Department listlessly administering an act which is vitally important to the economic well-being of a large group of employees with marginal incomes.

The spectacle of the Post Office actively promoting cuts in the wages of star route drivers, of the Air Force eagerly pressing to get the successor doctrine overturned, of NASA deliberately setting out to cut the wages of service workers in order to test the successor doctrine, is nothing less than incredible. The ready sanctioning of these efforts by the GAO, not through ill will, but through a stubborn ignorance of what the service industry is like and what the devastating effect of their decisions on individual service contract workers might be, is an unacceptable exercise of its responsibilities.

In an age where many citizens mistrust their Government, where the unmasking of large-scale corporate deception has become commonplace, we can ill afford what we have seen throughout these hearings: large Government agencies making questionable cost cutting decisions from the remoteness of Washington offices with a seeming disregard for their social consequences.

It appears that the Congress was wise to emphasize the oversight responsibilities of legislative committees in the Legislative Reorganization Act of 1970. It also appears that our task is much larger in scope than we had imagined.

IX. ADDITIONAL OBSERVATIONS

* * * *

4. THE FREQUENCY OF WAGE DETERMINATIONS

29 C.F.R. 4.4 provides that agencies shall notify the Department of Labor of their intention to make a service contract, so that the Department can respond with a wage determination to be included in the invitation to bid. We are aware of no monitoring system to insure that agencies submit the required notice.

5. IS THE GOVERNMENT REALLY SAVING MONEY?

* * * *

Mr. ASHBROOK. From what your testimony has indicated, it appears that most of the $4 million came out of the hides of the workers.

Senator CHILES. Not all union workers now, because there were many workers involved who were nonunion, the engineers and other related people.

Mr. ASHBROOK. But most of it came out of the situation where lower wages——

Senator CHILES. Yes, sir; it was wages that made the difference.

Hearings, page 206.

97th Congress
2d Session } COMMITTEE PRINT

CONGRESSIONAL OVERSIGHT HEARINGS CONCERNING PROPOSED SERVICE CONTRACT ACT REGULATIONS

REPORT
OF THE
SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS
OF THE
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES
HOUSE OF REPRESENTATIVES
together with
MINORITY VIEWS

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EXCERPTS

* * * *

3. Coverage of Visitor Information Services

The third proposed exemption is for so-called "concession contracts" such as those for "food, lodging, automobile fuel, *visitor information services*, newspaper stands and recreational equipment to the general public, as distinguished from the United States government or its personnel." Again, the Department is basing its exemption on one remark made on the House floor concerning amendments to the Fair Labor Standards Act in 1966. This is simply an insufficient basis to meet the strict test imposed upon the Secretary of Labor in granting an exemption. The only court which has considered SCA coverage of concession contracts held:

> The language of § 351(a) is clear and unambiguous. Congressman O'Hara's isolated comment cannot change the effect of the plain language of the statute itself . . . the court finds that concession contracts such as the VIC contract are covered by the SCA (*District Lodge No. 616 IAM b. TWA Services, Inc.*, No. 79-405-Orl-Civ-T (M.D. Fla. Nov. 17, 1981).)

Testimony offered concerning "visitor center" contracts demonstrated that the workers employed under these contracts are precisely those in need of SCA protection and precisely those Congress intended to protect:

> Another proposed exemption which we consider arbitrary and unjustified would wholly exclude employees of contractors servicing visitor information centers at Federal installations. . . .
>
> For some years we have represented employees who service and maintain grounds and facilities for NASA Visitor's Center at Cape Kennedy. The major contractor for this work was the Boeing Services Corporation. The Visitor's Center itself was op-

erated under contract by TWA Services, Incorporated. . . .

However, when TWA, which already had the Visitor's Center Concession, was also awarded a piece of the ground and facilities maintenance contract, it claimed such work was also exempt by virtue of the concessionaire interpretation. It refused to honor the wages and benefits negotiated with the predecessor employer, Boeing Services.

TWA Services, Inc., immediately hired many new workers at lower wages and with fewer fringe benefits than had been required under the Boeing Services contract.

The Machinists Union went to court seeking enforcement of the former wage determination. . . . It [The Department of Labor] is not only prepared to grant a blanket exemption for all the concessionaire services to the public but wants to extend this exemption to ground and building maintenance work at government facilities. . . .

This not only exceeds the Secretary's authority, but in view of the purposes for which the Department of Labor was established, it really seems to me to be an outright perversion of that authority. (November 4, 1981, pp. 20-21.)

The Department has totally failed to comply with § 4 (b) in issuing this proposed exemption and it should not be issued as final.

* * * *

The proposed change in the definition of "arm's-length negotiations" appears to fundamentally mis-construe not only the SCA but the National Labor Relations Act as well. The proposed definition suggests that the concept of "arm's-length negotiations" is analogous to the obligation of employers and employees under the National

Labor Relations Act to bargain in "good faith". This is simply not the case. The failure to bargain in good faith under the NLRA refers to a situation of adversity in which parties demonstrate bad faith at the bargaining table. The arms-length standard was included in the 1972 amendments to prevent collusion between contractor and union during collective bargaining. *Such collusion it was feared might take place just as a contract was to expire resulting in a collective bargaining agreement containing artificially high terms that would be imposed on a successor contractor due to the successorship provision. Thus collusion was the concern in enacting an arms length standard not adversity which poses no threat to the successor contractor.* The proposal simply does not make sense.

The Department of Labor could shed little light on this extremely puzzling proposal during the hearing (see pages 704-706 of hearing). We suspect the proposed change was in fact an oversight. We suspect further that the lack of care demonstrated by the Department in making this proposal *reflects an overall lack of care in the development of all the proposed regulations.*

III. Enforcement of the Service Contract Act

Enforcement and adequate administration of the Service Contract Act has been and continues to be a problem. The Preliminary Regulatory Impact Analysis itself admits that there is an "average one-year lag in adjusting SCA determinations for changes in local wages." [14] Added to this administrative problem affecting every service contract worker is the persistent problem of certain procuring agencies refusing to comply with the terms of the Act. Workers, union representatives and contractors all provided testimony which indicates that the enforcement difficulties under the Act continue. One con-

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[14] Otter Letter, p. 723.

tractor, Brink's, Inc., which provides armoured car services to the Federal Reserve Board testified to the Board's persistent refusal to abide by the terms of the SCA:

> DONALD PAYNE. In our view, the Department's reexamination of its regulations on labor standards for Federal Service Contracts is seriously deficient in failing to consider the continuing evasions by the Federal Reserve System of the purpose of the law * * *
>
> Because the Service Contract Act has not been effectively enforced and, therefore, the purposes of Congress in passing the Act have not been achieved, Brink's is under a severe competitive handicap in bidding for government business, and, in particular the transportation of coin and currency for the Federal Reserve System * * *
>
> * * * As a result of the Department of Labor's refusal to enforce compliance, the Service Contract Act is being circumvented by the Federal Reserve System. The Department of Labor could mitigate the damage its refusal continues to cause by issuing a regulation requiring any contractor to inform the Department of Labor, within 30 days of the commencement of its contract, of the wages and fringe benefits it is paying its employees. *As matters now stands, no one is monitoring compliance by Government contractors with the requirements of the statute that the contract pay not less than the prevailing or predecessor wages and fringe benefits.* (November 4, 1981, pp. 251-252).

Representatives of service workers *also described the difficulties they encountered from procuring agencies unwilling to enforce the Act as well as the problem of recovering back-wages from contractors once violations are documented*:

> JOHN CURRAN. Mr. Chairman, one of the unfortunate aspects of proposed regulations such as

these is that they successfully turn the public's attention from the very real issues which do, in fact, exist under the law.

I am referring to the issues of enforcement which you have placed on the agenda of this hearing. Enforcement has always been and continues to be a grave problem in this industry.

The front-line of insuring that the proper wage determinations are included in Federal service contracts is in the procuring agencies themselves because it is they who must initially notify the DOL that a service contract is to be let.

Some procuring agencies are conscientious but others, unfortunately, *simply oppose this law and do not carry out their duties under the Act.*

Indeed, the failure of certain contracting agencies to enforce the Act has been documented by the General Accounting Office in its report entitled, Review of Compliance with Labor Standards for Service Contracts by Defense and Labor Departments issued by the GAO in January 1978.

The GAO found serious deficiencies in the administration of the Act by the Air Force, the Army, and the Navy. The GAO documented numerous instances of contracting agencies failing to request wage determinations from the DOL; obtaining wage determinations, and then failing to include them in the service contracts; failing to request wage determinations during the required 30-day period prior to the solicitation; and failing to notify the Department of Labor of the existence of collective bargaining agreements.

The GAO also found that *oftentimes when violations of the Act were discovered, many of the workers entitled to receive back wages * * * failed to actually* receive those wages.

For example, it found in the years 1974 and 1976 that 29 percent and 34 percent, respectively, of the back wages due workers were never restored to those workers.

Within our own union, we are continually frustrated by the inability to obtain adequate enforcement of the SCA. Moreover, when violations are uncovered, the ability to actually place back wages and fringe benefits into the pockets of the workers who have earned them is limited indeed. . . .

If there is to be any real enforcement under this law, the DOL must allocate the personnel and manpower needed to immediately investigate violations and obtain back pay while the contract funds still exist from which meaningful recovery can be made.

We have previously appeared before this subcommittee and have testified that one relatively easy mechanism to help achieve recovery of back wages and fringe benefits is the requirement of performance bonds.

If required, it would encourage stability in the industry by tending to ensure that only reputable contractors are awarded service contracts. (November 5, 1981, pp. 340-342).

* * * *

It is clear that the Department of Labor must allocate more of its resources to the enforcement of the Service Contract Act. It must ensure that wage and fringe benefit determinations in fact reflect the *current* prevailing rate rather than the rate at some point in the past. The Department should seriously consider bonding and stricter reporting requirements as suggested by some witnesses. Perhaps most importantly, staffing and budget decisions should reflect that enforcement and proper administration of the SCA are priorities of the Department of Labor.

IV. Conclusion: Legislation Through Regulation

* * * *

Moreover, the proposed regulations are an attempt to redraft the Service Contract Act by administrative action. It is simply an attempt to usurp the powers of Congress, and, for this reason alone the proposed regulations should be withdrawn.

Congressman Weiss voided the opinion of the Committee:

> "taking into context what has happened across the board in Federal agencies, with the effort to change legislation which does not fit with the philosophy of the new policy-makers in this Administration, there is a great tendency toward changing or attempting to change legislation that you don't like, or the Administration doesn't like, by regulating it, by changing the regulation."
>
> That concerns me from an institutional perspective.
>
> It seems to me if people are unhappy with the legislation, they ought to come to us and say we don't like the legislation, change it—then let Congress work its will—rather than doing a reverse switch. We have heard all through these past years, pepole who now are in this Administration complaining about the high-handedness of the regulator, the regulatory process. And here we are discussing a situation where many of these changes clearly, in my judgment, really go beyond the realm of regulatory change, they really require or ought to require legislation.
>
> Mr. Burton. If the gentleman will yield, I was a member of this committee and the subcommittee that processed this legislation. I fully affirm the gentleman from New York's point of view as being accurate. That is, what we have before is in most

respects is contrary to the very clear statutory language and legislative intent behind that language.

* * * I think that that again runs directly contrary to the intention of the legislation * * *. (December 10, 1981, pp. 707-708).

In conclusion, the Subcommittee recommends that the proposed regulations be withdrawn *in toto*.

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AREA CODE 202
223-9472

September 28, 1984

Administrator,
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Sir/Madam:

Please furnish us, within ten days, in accordance with the Freedom of Information Act, any and all information, data, statistics, or estimates you may have concerning the number of (a) employees; (b) employers; and (c) service contracts, excluded from SCA coverage by or under § 4.133(b) of DOL Rules and Regulations, 29 C.F.R. § 4.133(b), in its various versions, including proposed versions, pursuant to which DOL has operated from 1972 to date.

This information is necessary for presentation to the Supreme Court of the United States in a petition for certiorari now being prepared. Any delay or procrastination on your part, no matter how explained, will be reported to the Court.

Very truly yours,

/s/ Mozart G. Ratner
MOZART G. RATNER

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Mr. Mozart G. Ratner
1900 M Street, N.W.
Suite 610
Washington, D.C. 20036

Dear Mr. Ratner:

This is in response to your letter of September 28 requesting data under the Freedom of Information Act concerning certain contracts not subject to the Service Contract Act by virtue of the exception in section 4.133(b) of Regulations, 29 CFR Part 4.

We do not have any of the information you requested regarding number of employes, employers, and service contracts which are within the exclusive discussed in section 4.133(b).

We regret that we cannot provide any assistance to you in this matter.

Sincerely,

/s/ William M. Otter
WILLIAM M. OTTER
Administrator

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 79-405-ORL-CIV-Y

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff,

v.

TWA SERVICES, INC.; NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; AND RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Defendants.

[Filed July 21, 1982]

SUPPLEMENTAL AND SECOND AMENDED COMPLAINT

Plaintiffs, District Lodge No. 166, International Association of Machinists and Aerospace Workers (hereinafter District 166), sues for declaratory and injunctive relief against an invalid regulation of the United States Department of Labor; for an order compelling defendants Secretary of Labor, National Aeronautics and Space Administration and TWA Services, Inc., to comply with the Service Contract Act, 41 U.S.C. §§ 351, *et seq.*, and for damages against defendant TWA Services, Inc., four underpayment of wages in violation of that Act.

JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 704, insofar as this action seeks review of an allegedly invalid Department of Labor regulation, and pursuant to 28 U.S.C. §§ 1331, 1337, 1346 and 1361, insofar as this action alleges violations of the Services Con-

tract Act, 41 U.S.C. §§ 351, *et seq.* (hereinafter the Act or SCA), and the damages sought exceed ten thousand dollars ($10,000).

* * * * *

COUNT I

36. Plaintiff realleges paragraphs 1-35 as if specifically set forth herein.

37. By this failure to apply the Service Contract Act to the 1968 and 1979 VIC concession contracts as alleged in paragraphs 27 and 32, above, defendant Secretary has breached his clear statutory duty and/or ministerial obligations owed to the bargaining unit members represented by plaintiff and has thereby violated the Act.

38. Defendant Secretary denies that he has so violated the Act, thereby creating a bona fide dispute between interested parties with adverse and antagonistic claims which merits resolution by declaratory judgment.

WHEREFORE, plaintiff prays that this Court:

1. Enter a declaratory judgment in favor of plaintiff declaring 29 C.F.R. § 4.133(b) null, void and of no force or effect and declaring that the SCA applies to the VIC concession contracts between NASA and TWAS and that TWAS is for purposes of that Act a successor employer as to the transferred positions of groundskeepers, gardeners and general plant maintenance technicans, and further declaring that defendant Secretary of Labor, having violated Sections 352, 353, and 358 of the Act, shall henceforth fulfill his statutory obligations respecting those contracts by:

a) compelling TWAS forthwith to compensate its groundskeepers, gardeners and general plant maintenance technicans with back pay to the extent of the difference between the wage and fringe benefit rates fixed in his July and August 1978 wage determinations for those same services and the actual wages and fringe benefits

paid from their initial dates of hire through the expiration date of the 1968 VIC concession contract on or about April 30, 1980, together with interest thereon at the prime rate from November 1, 1978 to date of payment;

b) compelling NASA to submit to him forthwith the documents necessary for him to issue a wage determination for those services, including without limitation the general plant maintenance and outside area and/or grounds services, required by the 1979 VIC concession contract specifications;

c) treating NASA's request as if it were for wage determinations to be included in the original contract specifications and issuing wage determinations on that basis;

d) compelling TWAS to compensate its VIC employees with back pay to the extent of the difference between the wage and fringe benefit rates fixed in the Secretary's wage determinations and the wages and fringe benefits actually paid, together with interest thereon at the prime rate from May 1, 1978 to date of payment;

e) compelling TWAS to comply in the future with his wage determinations for employees performing services under the 1979 VIC concession contract.

2. Issue an injunction, or in the alternative a writ of mandamus, prohibiting the Secretary from maintaining, adhering to, or complying with the restricted interpretation of coverage embodied in 29 C.F.R. § 4.133(b) and requiring him to bring all existing government contracts previously exempted under that regulation into immediate compliance with the Act and further ordering the Secretary to fulfull the legal obligation set out in the Court's declaratory judgment.

3. Award plaintiff all of its costs and a reasonable attorneys' fees.

4. Grant such other relief as may be just and proper.

COUNT II

39. Plaintiff realleges paragraphs 1-35 as if specifically set forth herein.

40. Defendant NASA, by its refusal to compel TWAS to adhere to the Wage and Hour Administrator's July and August 1978 wage determinations for the services transferred to its contract from BSI and ESI, and by its refusal to request the Secretary to issue a wage determination for those services, including without limitation the outside area and/or grounds maintenance and general plant maintenance services, to be performed by TWAS under its 1979 VIC concession contract with NASA, has violated the SCA by failing to perform statutory duties and/or ministerial acts owed to the plaintiff as the representative of its members in the TWAS bargaining unit at issue, which are clear and certain and so plainly prescribed in the SCA as to be free from doubt.

41. Defendant NASA denies that it has so violated the Act, thereby creating a bona fide existing dispute between interested parties with adverse and antagonistic claims which merits resolution by declaratory judgment.

WHEREFORE, plaintiff prays that this Court:

1. Enter a judgment in favor of plaintiff declaring that the SCA applies to the VIC concession contracts between NASA and TWAS and that TWAS is a successor employer under the Act as to the transferred positions of groundskeepers, gardeners and general plant maintenance technicians, and further declaring that NASA by its conduct with respect to those contracts has violated §§ 351, 352 and 353 of the Act.

2. Issue a permanent injunction or, in the alternative, a writ of mandamus requiring that NASA comply with the SCA generally as to all concession contracts it bids and makes, and particularly as to the 1979 VIC concession contract, by submitting to the Secretary of Labor

the request and/or documents which he requires to issue a wage determination for the services to be provided thereunder, including, without limitation, general plant maintenance and outside area and/or grounds maintenance services required by the contract specifications.

3. Award plaintiff all of its costs and a reasonable attornneys' fee.

4. Grant such other relief as may be just and proper.

COUNT III

42. Plaintiff realleges paragraphs 1-35 as if specifically set forth herein.

43. Defendant TWAS, by failing to pay its VIC groundskeepers, gardners, and general plant maintenance technicans at the rates fixed in the Wage and Hour Administrator's July and August 1978 wage determinations during the period from in or about November 1978, when those positions were transferred to its contract, to on or about April 30, 1980, when that contract expired, and by thereafter failing to compensate its employees performing services under its 1979 VIC concession contract at rates which were not, but should have been, fixed by wage determinations issued by the Secretary of Labor, has violated the Services Contract Act.

44. Defendant TWAS denies that it has so violated the Act thereby creating a bona fide existing dispute between interested parties with adverse and antagonistic claims which merits resolution by declaratory judgment.

WHEREFORE, plaintiff prays that this Court:

1. Enter a judgment in favor of plaintiff declaring that the SCA applies to the VIC concession contracts between NASA and TWAS, and that TWAS is a successor employer under the Act as to the transferred positions of groundskeepers, gardeners and general plant maintenance technicians, and further declaring that TWAS, by its con-

duct with respect to those contracts, has violated §§ 351 and 353 of that Act.

2. Enter a permanent injunction compelling TWAS to comply with the SCA in its performance of its 1979 VIC concession contract.

3. Award the VIC groundskeepers, gardeners and general plant maintenance technicians monetary damages to the extent of the difference between wages and fringe benefits which they should have received from TWAS pursuant to the Wage and Hour Administrator's July and August 1978 wage determinations and the wages and fringe benefits they did receive from TWA from their initial hire dates to the expiration date of the 1968 VIC concession contract on or about April 30, 1980, together with interest thereon at the prime rate from November 1, 1978 to the date of payment.

4. Award the employees performing services for TWAS under its 1979 VIC concession contract, including, without limitation, groundskeepers, gardeners, and general plant maintenance technicians, monetary damages to the extent of the difference between the wages and fringe benefits fixed in the Secretary's wage determination once it is issued for the 1979 VIC concession contract and the wages and fringe benefits actually paid to those employees, from the effective date of the contract, on or about May 1, 1980, to the date on which the TWAS wage structure comes into current compliance with the Secretary's wage determination, together with all interest thereon at the prime rate from May 1, 1980, to the date of payment.

5. Award plaintiff all of its costs and a reasonable attorneys' fee.

6. Grant such other relief as may be just and proper.

COUNT IV

45. Plaintiff realleges paragraphs 1-44 as if specifically set forth herein.

46. On November 17, 1981, this Court issued its Memorandum Opinion holding that the TWAS-NASA-VIC concession agreement is subject to SCA. On December 21, 1981, the Government defendants moved for a stay of further proceedings herein upon the representation that NASA would submit to the Secretary of Labor a request for wage determination pursuant to 29 C.F.R. § 4.4, and that the Secretary of Labor would thereupon issue a wage determination pursuant to 29 C.F.R. § 4.3, pertaining to the subject agreement.

47. By the 1972 amendments to SCA, Congress imposed upon the Secretary of Labor a mandatory duty to issue wage determinations for every SCA-covered contract "as soon as it is administratively feasible to do so" (41 U.S.C. § 358), and explicitly denied to the Secretary authority to exempt any SCA covered contract from performance of that duty (41 U.S.C. § 353(b)).

48. Despite the representation referred to in par. 46 above, defendant NASA has unlawfully failed to submit its TWAS-VIC contracts to the Secretary of Labor for wage determinations, and defendant Secretary of Labor has unlawfully failed to issue wage determinations for said contracts.

49. By this unlawful inaction, the Government defendants are, in effect, perpetuating their unlawful exclusion of the TWAS-NASA-VIC contract from SCA coverage, in defiance of this Court's decision and of the remedial objective of the SCA as defined in its Memorandum Opinion, p. 2 and n.2.

Wherefore, plaintiff prays that this Court (1) issue a mandatory injunction:

(a) compelling defendant Secretary of Labor to issue and defendant NASA to incorporate in its TWAS-VIC contracts, *nunc pro tunc*, wage determinations retroactive to August, 1978, based upon the wage rates and fringe benefits to which groundskeepers, gardeners and special plant maintenance technicians would have been entitled if they had been employed under NASA-VIC contracts with defendant TWAS' predecessors, ESI and BSI (41 U.S.C. § 353 (c)), and which they would have received if the defendants had timely performed their statutory duties; and

(b) compelling defendant Secretary of Labor to compute the amount of underpaid compensation due said employees, with interest to the date of payment at the prime rate;

(c) compelling NASA to withhold from any and all amounts due defendant TWAS and deposit in a special fund the amount of underpayment with interest computed as aforesaid; and

(d) compelling defendant Secretary of Labor to order defendant NASA to pay all said sums directly to the underpaid employees;

(2) award plaintiff counsel fees against the Government defendants pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

COUNT V

50. Plaintiff realleges paragraphs 1-49 as if specifically set forth herein.

51. Jurisdiction under this Count is invoked under § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185a. Plaintiff alleges that defendant TWAS violated collective bargaining contracts (hereinafter CBAs), legally interpreted and construed, between itself and defendant TWAS dated No-

vember 1, 1978 and November 2, 1980, by paying groundskeepers, gardeners and general plant maintenance technicans less than the wages mandated by SCA, 41 U.S.C. § 353(c), which rates are incorporated into said CBAs *nun pro tunc* by operation of law, and seeks appropriate relief for the aforesaid violations.

52. On November 2, 1977, plaintiff and defendant TWAS entered into a three year CBA covering certain classifications of employees at VIC (other than groundskeepers, gardeners and general plant maintenance technicians), establishing rates of pay and other terms and conditions of employment for the covered classifications (App. 1, hereto).

53. Following the transfer of certain VIC services from ESI and BSI to TWAS by modification of the NASA-TWAS-VIC concession agreement, effective August 24, 1978, plaintiff and defendant TWAS on November 1, 1978, by Letter of Understanding, amended their 1977 CBA to include the TWAS job classifications of groundskeepers, gardeners and general plant maintenance technicians, Modification 9. (Supplemental and Second Amended Complaint pars. 3, 22; App. 2, hereto). On December 14, 1978, defendant TWAS began hiring employees in these classifications to perform the work previously performed by ESI and BSI.

54. The duties of employees classified by TWAS as "groundskeepers" and "gardeners" had been performed before the transfer by employees classified by ESI as "labor-operators". The duties of the employees classified by TWAS as "general plant maintenance technican" had been performed before the transfer by employees classified by BSI as "electricians", "air conditioning mechanics", "painters", "carpenters", "water and waste mechanics", "electronic technicians" and "general mechanics."

55. The Letter of Understanding authorized TWAS to establish "a classification and *temporary* rate for [each]

such [newly included] job" (emphasis added), pending resolution of the controversy between plaintiff and defendants over the applicability of SCA to the work transferred by the NASA-TWAS-VIC concession agreement.

56. Pursuant to the Letter of Understanding, on the theory that SCA is inapplicable to its VIC concession agreements with NASA, TWAS, on or before December 14, 1978, established temporary rates for groundskeepers, gardeners and general plant maintenance technicians far lower than the rates which had been paid for said work by ESI and BSI (Supplemental and Second Amended Complaint par. 26).

57. SCA, 41 U.S.C. § 353(c) provides:

> "(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entiled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." (Supplemental and Second Amended Complaint, par. 18.)

58. In or about the middle of July, 1978, NASA entered into a ten year concession contract with TWAS for the same services which were covered by the August 24, 1978, concession agreement referred to in paragraph 53

above. (Supplemental and Second Amended complaint, pars. 28-31.)

59. Beginning before August, 1978, IAMAW, plaintiff District 166, and individual members of the bargaining unit unsuccessfully demanded that NASA submit for a wage determination under SCA its concession contracts with TWAS and unsuccessfully demanded that the Secretary of Labor issue a wage determination for the aforesaid NASA-TWAS-VIC concession contracts (Supplemental and Second Amended Complaint, pars. 26, 27).

60. At no time has the Secretary of Labor held a "variance" hearing pursuant to the proviso to 41 U.S.C. § 353(c) concerning the work transferred from ESI and BSI to TWAS on August 24, 1978.

61. The initial complaint in this action was filed on or about August 16, 1979.

62. On November 2, 1980, plaintiff and defendant TWAS entered into a three year CBA applying, *inter alia*, to the VIC jobs covered by the July 1, 1979, TWAS-NASA-VIC concession agreement (App. 3, hereto). (TWAS' Supplemental Memorandum in Support of its Motion for Summary Judgment and In Opposition to Plaintiffs' Supplemental Cross Motion for Summary Judgment, dated September 4, 1981, p. 5, hereinafter "TWAS Supp.") The 1980 CBA conditionally established rates for groundskeepers, gardners, general plant maintenance technicians and general plant maintenance helpers which were far below: (1) the rates which would have been paid by ESI and BSI had the services involved continued to be performed by them; and (2) the rates which would have been paid by TWAS if it had treated SCA as applicable to its concession agreements with NASA.

63. Recognizing that the obligation of TWAS to pay higher wages to these classifications was dependent upon judicial resolution of the SCA coverage issue in the then

pending instant case, plaintiff and defendant TWAS agreed that if the Court found SCA applicable, TWAS would adjust the wage rates retroactively to conform with the law. (Affidavit of F. Roger Kenrick, dated September 14, 1981; P's Reply to TWA's Supplemental Memorandum, dated September 14, 1981, pp. 9-12, hereinafter "P. Reply".)

64. The Court having determined on November 17, 1981, that SCA is applicable to the NASA-TWAS-VIC concession agreements, the wage rates and fringe benefits TWAS was required by 41 U.S.C. § 353(c) to pay are, by operation of law, incorporated into the CBAs of November 1, 1978 and November 2, 1980, *nunc pro tunc.*

65. Nevertheless, TWAS has failed to adjust its contractual rates of pay and fringe benefits and has failed to compensate its employees for the underpayment.

66. By failing to honor its contractual obligation to pay the aforesaid rates, defendant TWAS has been and still is violating the CBAs of November 1, 1978 and November 2, 1980.

67. *WHEREFORE*, plaintiff prays that this Court:

(1) enter a judgment in favor of the plaintiff declaring that defendant TWAS has been and still is violating the CBAs of November 1, 1978 and November 2, 1980 by paying wages to its groundskeepers, gardeners and general plant maintenance technicians less than required by said CBAs, legally interpreted and construed, and

(2) enter a prohibitory and mandatory injunction requiring TWAS to cease and desist from the aforesaid breach and pay to its aforesaid classifications of employees the wages required by said CBAs, legally interpreted and construed, and

(3) enter a judgment requiring TWAS to pay damages to the extent of the difference between the amount of wages and fringe benefits TWAS paid its aforesaid

classifications of employees pursuant to the CBAs of November 1, 1978, and November 2, 1980, and the amount of wages and fringe benefits required by said CBAs, legally interpreted and construed, together with interest thereon at the prime rate from November 1, 1978 until the date of payment;

(4) award plaintiff all of its costs and a reasonable attorneys' fee;

(5) grant such other relief as may be just and proper.

Respectfully submitted,

/s/ Mozart G. Ratner
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82-3159

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff

v.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
MARSHALL, RAY C., SECRETARY OF LABOR,
DEPARTMENT OF LABOR,
Defendants

Complaint Amended—1st date 5-28-81
2nd date 7-21-82

Closed—9-24-82

APPEALED

CAUSE

Complaint for Declaratory Relief, Mandatory, Preliminary and Permanent Injunctive Relief; Writs of Mandamus and Damages concerning violations of the Service Contract Act.

dhb

DATE	NR.	PROCEEDINGS
1979		X Cards
Aug	20	Complaint filed, Summons issued and delivered to Marshal for service
	20	Notice to Counsel Re: Preliminary Injunction mailed this date
	22	Mar. Ret. on Summons as to U.S. Attorney EXEC. 8-21-79

DATE	NR.	PROCEEDINGS
1979		
	22	Mar. Ret. on Summons as to Sec of Labor EXEC. 8-21-79
	22	Mar. Ret. on Summons as to NASA EXEC. 8-21-79
	28	Mar. Ret. on Summons as to Dept of Labor, EXEC. 8-24-79
	28	Mar. Ret. on Summons as to N.A.S.A., EXEC. 8-24-79
Sept.	10	MOTION for Extension of Time, by TWA—GRANTED & SO ORDERED 9-11-79 GCY ctc R29D1588 (time extended thru 10-19-79)
	13	Mar. Ret. on Summ. as to TWA, exec. 8-23-79
Oct.	16	MOTION for Extension of Time to ans. by defts. NASA & memo.—GRANTED AND SO ORDERED 10-22-79 GCY
	22	ANSWER, COUNTERCLAIM & CROSS-CLAIM, fld. by TWA
Nov.	5	Dist. 166's ANSWER to TWO's Counter-claim
	9	First AMENDED CROSSCLAIM, by TWA
	20	Government's Second MOTION for Extension of Time—GRANTED AND SO ORDERED 11-25-79 GCY until 1-25-79
1980		
Jan.	10	Govt's Third Motion for Extension of Time by defts. NASA & Marshall, w/memo attached GRANTED & SO ORDERED, allowing Gov't thru 1-28-80 to respond to pltf's complaint R30D1591 GCY ctc
	28	Govt's 4th MOTION for Extension of time

DATE	NR.	PROCEEDINGS
1980		
	28	ORDER, granting Govt's m/extension of time until 5:00 PM, 2-11-80 w/in which to file answer to other responsive pleading on behalf of defts . . . No further extension will be granted R3OD1925 GCY ctc
Feb.	6	ANSWER, by defts. NASA & Secty/Labor
	6	ANSWER to First Amended Crossclaim, by NASA & Secty/Labor
Mar.	28	Notice of Taking Depositions of Gary D. Williams at 9:30 AM, Dennis Kelemen at 10:30 Horace T. Hughes, at 11:30 AM, Ken Senior at 2:30 PM, and Harry F. Redding, Jr., at 3:30 PM, commencing at 9:30 AM, 4-17-80 & continuing from day to day until completed, in Cape Canaveral
	28	Notice of Taking Depositions commencing on 4-16-80 & continuing until completed: Orville Burdo at 9:30 AM, Charlie Muhs at 10:30 AM, Eugene A. Flores at 11:30 AM, B. L. Carpenter at 2:30 PM, & Williams P. Ponader at 3:30 PM
Apr.	2	Notice of Taking of Depos. in Cape Canaveral as follows: Orville Burdo at 9:30 AM Charlie Muhs at 10:30 AM Eugene A. Flores at 11:30 AM B. L. Carpenter at 2:30 PM William P. Ponader at 3:30 PM
	4	Notice of Taking deposition of the following on April 17th 1980 Cape Canaveral, Fla; Gary D. Williams at 9:30 A.M. Dennis Keleman at 10:30 A.M. Horace T. Hughes at 11:30 A.M. Ken Senior at 2:30 P.M. Harry F. Redding Jr. at 3:30 P.M.

DATE	NR.	PROCEEDINGS
1980		
	7	Request for Production filed by Plaintiffs from TWA Services Inc.
	7	Request for Production filed by Plaintiffs from Secretary of Labor
	8	Ret. on Subp. as to Harry F. Redding, Jr., exec. 4-3-80
	8	Ret. on Subp. as to Gary D. Williams, exec. 4-3-80
	8	Ret. on Subp. as to Eugene A. Flores, exec. 4-3-80
	8	Ret. on Subp. as to Orville Burdo, exec. 4-3-80
	8	Ret. on Subp. as to Wm. P. Ponader, exec. 4-3-80
	8	Ret. on Subp. as to Charlie Muhs, exec. 4-3-80
	8	Ret. on Subp. as to B. L. Carpenter, exec. 4-3-80
	8	Ret. on Subp. as to Horace T. Hughes, exec. 4-3-80
	8	Ret. on Subp. as to Ken Senior, exec. 4-3-80
Apr.	8	Ret. on Subp. as to Dennis Kelemen, exec. 4-7-80
	8	Request for Production, directed to NASP by Lodge 166
	9	Defendants response to Plaintiffs Request for Production filed
May	14	MOTION for Extension of Time by USA thru 5-15-80—GRANTED & So Ordered 5-14-80 GCY ctc R31D2340

DATE	NR.	PROCEEDINGS
1980		
May	15	MOTION for Protective Order, fld. w/memo in support—
	16	MOTION to Amend M/Extension of time by USA thru 5-22-80—GRANTED & SO ORDERED 5-2 ctc R31D2440 GCY
	20	MOTION for Stay of all disc. or, in alt., for enlargement of time of 20 days, fld. w/memo in support by USA
	22	Order Staying all discovery pending this Court's final ruling on dispositive Motions for Summary Judgment; if Defts' Motions for Summary Judgment are Denied, Defts. shall have 20 days to respond to Pltf's discovery requests GCY R31D2438 ctc
	27	Ctfd. Questions re. Depo of Harry F. Redding, Jr.
	27	Depo. of Horace T. Hughes taken 4-17-80, fld.
	27	Depo. of Dennis Kelemen taken 4-17-80, fld.
	27	Depo. of Orville Burdo taken 4-16-80, fld.
	27	Depo. of B. L. Carpenter taken 4-16-80, fld.
	27	Depo. of Wm. George Ponader, Jr., taken 4-16-80, fld.
	27	Depo. of Gary D. Williams taken 4-16-80, fld.
	27	Depo. of Eugene A. Flores taken 4-16-80, fld.
	27	Depo. of Charlie Muhs taken 4-16-80; fld.
	27	Depo of Ken Senior taken 4-17-80, fld.
	27	Depo of Harry F. Redding, Jr., taken 4-17-80, fld.

DATE	NR.	PROCEEDINGS
1980		
	27	Dist. 166's OPPOSITION to TWA's M/Protective Order & to NASA & Marshall's m/Stay of all Disc.
	30	MOTION for Reconsideration of defts' Nasa & Marshall, M/Stay of all disc., etc., w/MEMO, fld.
June	5	Affidavit of Counsel George H. Tucker certifying efforts to Resolve Objections to Motion to Compel filed
	5	Plaintiffs Motion to Compel Production of Documents filed with memo attached
	5	AMENDMENT TO ORDER OF May 22, 1980 staying discovery pending this courts final Ruling on dispositive Motion for Summary Judgment soon to be filed R32/D288 GCY
	18	TWA Services, Inc. RESPONSE to Dist. 166's m/compel production of requested document
	18	Fed. Defts' MOTION for an enlargement of time in response to Court's order of 6-5-80 Amendment to order, fld.
	19	ORDER granting m/enlargement of time allowing fed. defts. until 7-20-80 to serve m/summ. judg. upon pltf.
	20	Dist. 166's RESPONSE to Fed. Defts' M/Enlargement of time, etc. & its request for disc. during this period
	19	Deft's MOTION for Summ. Judg., by deft. TWA fld in Tampa

DATE	NR.	PROCEEDINGS
1980		
	19	Affidavit of James J. Dillon, fld. in Tampa w/exhibits in sep. envelopes (2) MEMO in support of M/SJ fld in Tampa
	30	Dist. 166's Request for an enlargement of time to respond to m/SJ entered for & on behalf of TWA
July	2	ORDER signed 7-1-80, directing pltf. to file response to defts' motions for SJ by 8-15-80 R32D623 GCY ctc
	21	Fed. Defts' MOTION for Summ. Judg., fld w/MEMO in support
Aug	1	Plaintiffs Rule 56(f) Motion for Enlargement of time to Respond to Defendants Pleadings filed with memorandum attached
	8	ORDER, granting pltf's m/enlargement of time to extent set forth below; amending order of 5-22-80 to provide pltf. to take depo. of Dillon prior to filing of response to defts' motions for SJ; directing pltf. to file response to motions for SJ by 11-15-80 R32D1880 GCY ctc
	8	STIPULATION, fld. w/proposed order
Sept.	10	Notice of appearance as co-counsel, by atty. Ratner, for Dist. Lodge 166
Oct	3	*Order and Notice of Pre-Trial Conference and Non Jury Trials* as follows R33/D856 1. Pre-Trial Conference 1:30 P.M. March 16th 1981 2. Non Jury Trial 9:30 A.M. March 18th 1981 3. Discovery must be completed on or before February 20th 1981

DATE	NR.	PROCEEDINGS
1980		
		4. Plaintiffs Counsel is to arrange meeting at least 30 days prior to P.T.C.
		5. If Continuance is desired Motions must be filed at earliest possible time
		6. Counsel must have complete authority to settle at P.T.C. or have someone who do
		7. Magistrate is authorized to conduct preliminary conference
	8	NOTICE OF Disc. Stat. Conf. before Magistrate at 4:30 PM, Tues., 1-6-81, Rm. 528
Nov.	13	MOTION to Amend Complaint, fld w/ amended complaint & proposed order
	13	MEMO of Points & authorities in support of m/amend complaint
	13	Pltf. District 166's *Cross-Motion for Summ. Judg.*
	13	MOTION of Pltf. for Leave to file memo in excess of 20 pgs. & for Oral argument on Cross-Motion for SJ, fld w/proposed order & memo
	13	Pltf. Dist. 166's Request for Admissions to Fed. defts.
	14	ORDER, directing filing of Pltf's Memo, instanter R33D1906 GCY ctc
	14	Pltf's MEMO in Reply to Defts' memo & in Support of Pltf's Cross-M/SJ, fld.
	24	Deft. TWA Services's MOTION for Enlargement of time—GRANTED 11-28-80 GCY ctc R3
	25	Governments Motion for Enlargement of Time to respond filed—GRANTED 11-28-80 GCY R33D2262 ctc

DATE	NR.	PROCEEDINGS
1981		
Jan.	6	Proceedings before Magistrate at Disc. Stat. Conf.: Gov't allowed additional disc. time R34D682
	15	Deft. TWA's MOTION for Enlargement of time GRANTED AND SO ORDERED 1-16-81 GCY
	15	Minutes of Disc. Stat. Conf.: acknowledgement of Government's m/enlargement
	23	Second MOTION for enlargement of time & points and authorities in support, by Fed. Defts.
	26	Ct. Rptr's TRANSCRIPT of Disc. Status Conf., fld.
	26	Deft. TWA's MEMO in opposition to pltf's m/Amend Complaint, fld in Tampa
	26	Deft. TWA's MEMO in opposition to pltf's Cross-Motion for Summ., Judg., fld in Tampa
	27	Cy/letter to Court from counsel for TWA stating that they will provide Court w/aff: verifying authenticity of concession contract attached to memo in opposition to Cross-motion for SJ
	29	ORDER, granting 2nd m/enlargement & allowing defts. until 3-27-81 to respond to pltf's motions R34D1230 GCY etc
	29	Pltf's Opposition to Gov't's m/enlargement of time
Feb.	2	Pltf's Supp. Cross Motion for Summ. Judg. as to Liability, & proposed order
	2	MEMO in support of pltf's supp. cross motion for SJ as to Liability

DATE	NR.	PROCEEDINGS
1981		
	9	Deft TWA's MOTION for Extension of time to 3-27-81 to respond to Pltf's Supp. Cross-Motion for Summ. Judg., & MEMO in support
	13	Order Granting Motion for Extention of Time but advising Counsel no further Extentions will be granted R34/D1706 GCY
	17	TWA's Supp. MOTION for Summ. Judg.
	19	District 166's MOTION to Continue PT Schedule, Conf. & Trial & MEMO in support, fld w/proposed order
	20	Pltf's Response to Deft TWA's Reply MEMO in opposition to pltf's Cross-Motion for Summ. Judg.
Feb.	20	Pltf's Reply to Deft TWA's MEMO in opposition to pltf's m/amend complaint
	20	MOTION for leave to file instanter replies to deft. TWA's Memo in opposition to Pltf's m/amend complaint & in opposition to pltf's cross m/summ. judg., fld w/proposed order
	23	Letter & Attachment in support of Pltf's Reply to TWA's Memo in opposition to pltf's cross-m/summ. judg.
	23	Order Granting Plaintiffs Motion to Continue Pre-Trial Conference and Trial to be Re-set by Further Order of Court R34/D1936 GCY
	27	Fed. Defts' REPLY to pltf. Dist. 166's Request for Admissions, fld by Gordon K. Gilson
	27	Fed. Defts' RESPONSE to pltf's Request for Admissions, fld by Dorothy P. Come

DATE	NR.	PROCEEDINGS
1981		
	27	ANSWER to pltf's first amended complaint for declaratory and injunctive relief & for writs of mandamus and for damages (service contract Act.), fld by defts. Nat. A. Space Admin & Raymond Donovan
	27	Government's MOTION for Enlargement of time to file reply memo to pltf's motion for summ. judg., fld w/MEMO in support ***
Mar.	27	MEMO in opposition to Pltf's Supp. Cross-Motion for Summ. Judg. as to Liability fld in Tampa (rec'd in Orl. 3-30-81)
	31	M/Enlargement of time GRANTED 3-30-81 by Judge Young R35D315 etc
Apr	3	Federal Defendants Reply Memorandum and Opposition to Plaintiffs Cross Motion for Summary Judgment filed
	9	Pltf's MOTION to Strike Defenses 1, 2, & 3 from Fed. Defts' Answer
	9	Pltf's Reply to Deft. TWA's Memo in opposition to pltf's supp. cross motion for summ. judg. as to liability
	9	Pltf's Response to Fed. Defts' Reply memo and opposition to pltf's cross-motion for summ. judg.
	9	Pltf's REPLY to Deft. TWA's Supp. M/ Summ. Judg.
	9	Pltf. Dist. 166's Request for Admissions to Fed. Defts., fld.
May	11	Federal Defendants Reply to Plaintiffs Request for admissions filed (NASA)
	11	Federal Defendants Response to Plaintiffs Request for Admissions (SEC LABOR)

DATE	NR.	PROCEEDINGS
1981		
	28	ORDER, granting pltf's m/amend complaint & ordering that pltf's *First Amended Complaint* be fld instanter R35D1976 GCY etc
	28	FIRST AMENDED COMPLAINT for Declaratory & injunctive relief & for Writs of Mandamus & for Damages & Service Contract Act), fld.
June	29	Supp. MEMO re. recent decision, fld by pltf.
July	10	Notice of Hearing on Pending Motions for Summary Judgment, 9:30 A.M. 8-27-81
	17	Pltf's Motion to reschedule hrg. on pending motions for summ. judg.
	23	Notice of CANCELLATION OF HEARING prev. set for 8-27-81
	29	Notice of change of address of counsel for TWA—notice of cancellation re-sent to counsel Blue
Aug	11	Notice of Hearing on Motion for Summary Judgment, 10:30 A.M. Friday 9-18-81
Sept.	9	TWA's Supp. MEMO in support of its m/SJ & in Opposition to pltf's supp. cross M/SJ, fld. 9-8-81 in Tampa
	9	MOTION for leave to file supp. memo, by TWA, fld 9-8-81 in Tampa GRANTED AND SO ORDERED 9-9-81
	9	TWA's Supplemental Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Plaintiffs Supplemental Cross Motion for Summary Judgment filed
	10	Letter from defendant indicating that Appendix I was not attached to memorandum filed on 9-9-81 and submits that appendix to be attached

DATE	NR.	PROCEEDINGS
1981		
	15	Pltfs' REPLY to TWA's Supp. Memo in support of m/SJ & in opposition to pltfs' Supp. cross m/SJ
Sept	18	Proceedings on Hearing on Motion for Summary Judgment
	18	Court takes under advisement and will issue an order
Nov.	17	MEMORANDUM OPINION, fld.
	17	ORDER, denying motions for summ. judg. fld by defts.; allowing parties 30 days w/in which to advise the Court of issues remaining to be litigated in this procceeding R37D958 GCY ctc
Dec.	17	MOTION for Extension of time through 12-22-81 to respond to Court's Order of 11-1 fld by USA—GRANTED AND SO ORDERED GCY 12-21-81
	23	Status Report filed
	28	Plaintiffs Stement of Remaining Issues filed
	30	Response to Order of 11-17-81, fld by atty. Blue re. issues remaining
1982		
Feb	19	MEMORANDUM IN SUPPORT OF EMPLOYER'S POSITION THAT NO DAMAGES ARE PAYABLE
	22	STATUS MEMORANDUM of Plt
Apr.	29	NOTICE OF PRE-TRIAL AND NON-JURY Pretrial at 2:30 on 7-7-82 EAK and nonjury on 7-18-82 Ctc w/Rule 3.06-07
June	1	NOTICE of Appearance of Betsy J. Grey for USA

DATE	NR.	PROCEEDINGS
1982		
	16	MOTION FOR LEAVE TO SUPPLEMENT AND TO AMEND COMPLAINT by plt
	16	MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO SUPPLEMENT AND TO AMEND AMENDED COMPLAINT and IN RESPONSE TO TWA SERVICES' MEMORANDUM IN SUPPORT OF EMPLOYER'S POSITION THAT NO DAMAGES ARE PAYABLE by plt
	16	Certificate of Service
	16	MOTION TO RECONSIDER COURT'S DECLINATION TO PASS ON THE LEGALITY OF DOL REGULATION by plt
	16	MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION by plt
	16	MOTION FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF TWENTY PAGES AND FOR ORAL ARGUMENT ON THE ISSUES PRESENTLY PENDING BEFORE THE COURT by plt
	28	Erratta changing typographical errors in Motion for Leave to Supplement,
	28	MEMORANDUM IN OPPOSITION TO MOTION TO AMEND COMPLAINT by TWA
	28	MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER COURT'S DECLINATION TO PASS ON THE LEGALITY OF DOL REG by TWA
July	6	DEFENDANTS OPPOSITION TO PLAINTIFFS MOTION FOR RECONSIDERATION OF THIS COURT'S ORD.
	7	NOTICE OF APPEARANCE FILED BY JUNE WAGONER FILED

DATE	NR.	PROCEEDINGS
1982		
	7	FEDERAL DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION FOR LEAVE TO SUPPLEMENT AND TO AMEND COMPLAINT
	7	CERTIFICATE OF SERVICE OF PLAINTIFFS REPLY TO MEMORANDA IN OPPOSITION TO PLAINTIFFS MOTION TO RECONSIDER COURTS DECLINATION TO PASS ON LEGALITY OF DOL REGULATION
	7	PLAINTIFFS REPLY TO MEMORANDA IN OPPOSITION TO PLAINTIFFS MOTION TO RECONSIDER COURTS DECLINATION TO PASS ON THE LEGALITY OF DOL REGULATION FILED
	7	PRE-TRIAL STATEMENT FILED BY TWA
	7	PROCEEDINGS ON PRE-TRIAL CONFERENCE R39/D1168 EAK Counsel estimate ½ day trial time Court direct counsel to file Motions and Cross Motions for Summary Judgment NLT 8-9-82 Court will set this or oral arguments during the week of 8-16-82 Court will rule on Motion to Supplement and Amend Complaint NLT 7-16-82
	16	ORDER that the motion for leave to supplement and to amend amended complaint of 6-16-82 is GRANTED and plt has 5 days to file its second amended and supplemental complaint; the def shall serve their responses to the supplemental and second amended complaint within 10 days of service EAK R39D1533 Ctc

DATE	NR.	PROCEEDINGS
1982		
July	16	ORDER that plt is allowed to file a memorandum in excess of twenty pages in support of Motion for Leave to Supplemnt and to Amend Amended Complaint and in Response to TWA Services' Memorandum in Support of Position that No Damages are Payable; that said memoradnum be filed instanter EAK R39D1535 EAK Ctc
	19	ORDER that the court's order of 5-22-80 is amended to allow discovery relating additional issues raised by the 2nd amended and supplemental complaint; that such discovery shall be instituted prior to 7-28-82 and compliance with such discovery shall be complied with by 8-18-82; that parties' motions for summary judgment are to be filed no later that 8-9-82 and may be supplemented by newly discovered matter no later than 8-20-82 EAK R39D1587
	19	ORDER that the motion for reconsideration of declination to pass on the legality of DOL Reg is DENIED R39D1590 Ctc EAK
	21	*SUPPLEMENTAL AND SECOND AMENDED COMPLAINT*
	21	REQUEST for Admissions by plt
	21	NOTICE OF HEARING ON ALL PENDING MOTIONS at 10:30 AM on 8-25-82 #1 EAK
	29	Notice of taking Depo of Roger F. Kendrick on 8-10-82 by TWA
	29	Notice of taking Depo on 8-4-82 in Wash DC of Robert King, George Wright, and designee of Sec of Labor by plt

DATE	NR.	PROCEEDINGS
1982		
	29	Notice of taking Depo on 8-5-82 in Cape Canaveral of Harry Chambers, Robert Long, Paul Trammell, and William Loshe by plt
	29	*ANSWER* to the Supplemental and Second Amended Complaint by NASA, Donovan, FEDERAL Defs' RESPONSE to Plt's REQUEST for Admissions
	30	ANSWER to the Supplemental and Second Amended Complaint by TWA Services
August	2	RETURN ON DEPO SUBPOENAS EXECUTED on 7-27-82 on Paul Tramell, Harry Chambers, William Lohse, and Robert Long for Depo on 8-3-82
	2	RESPONSE TO REQUEST For Admissions by TWA
	9	MEMORANDUM IN SUPPORT OF Supplemental Motion for Summary Judgment as to Liability and Relief on Supplemental ans Second Amended Complaint by plt
	9	CERTIFICATE of Service
	9	SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY AND RELIEF ON PLT'S SUPPLEMENTAL AND SECOND AMENDED COMPLAINT by plt
	9	TWA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ALL PENDING ISSUES
	9	MOTION FOR SUMMARY JUDGMENT ON ALL REMAINING ISSUES by TWA
	9	AFFIDAVIT OF GEORGE WRIGHT with exhibits

DATE	NR.	PROCEEDINGS
1982		
	10	MOTION OF DEFENDANT TWA FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF TWENTY PAGES
	10	ORDER that def is allowed to file a memorandum in excess of 20 pages EAK R39D2275
	10	MOTION TO DISMISS by Federal Defendants' w/MEMORANDUM
	13	AFFIDAVIT of F. Roger Kendrick w/separate exhibit CBAs 1-23-78/4-18-81 & Cert Serv
	13	NOTICE TO TAKE Depo Upon Oral Examination of Robert King in DC 8-16-82
	13	DEPO of George Wright taken on 8-4-82
	13	DEPO of Robert E. King taken on 8-4-82
	13	DEPO of Raymond L. Kamrath taken on 8-4-82
	16	CERTIFICATE OF SERVICE by plt
	16	MOTION TO CLARIFY OR AMEND THE FIRST PARA OF DISCOVERY ORDER of 7-19-82 by plt
	16	MEMORANDUM IN SUPPORT OF MOTION TO CLARIFY by plt
	16	MOTION TO POSTPONE DATES FOR INSTITUTION AND COMPLETION of Discovery and for SUPPLEMENTING MOTIONS FOR SUMMARY JUDGMENT FIXED IN ORDER OF 7-19-82 AND FOR POSTPONEMENT OF THE HEARING PRESENTLY SCHEDULED ON DISPOSITIVE MOTIONS by plt

DATE	NR.	PROCEEDINGS
1982		
	16	MEMORANDUM IN SUPPORT OF MOTION TO POSTPONE by plt
August	16	MOTION TO SHORTEN TO TWO DAYS DEF'S TIME TO ANSWER PLT'S MOTION TO POSTPONE DATES FOR DISCOVERY AND FOR SUPPLEMENTING MOTIONS FOR SUMMARY JUDGMENT SET FORTH IN DISCOVERY ORDER OF 7-19-82 AND FOR POSTPONEMENT OF THE HEARING SCHEDULED ON DISPOSITIVE MOTIONS by plt
	16	DEPO of Harry B. Chamber taken 8-10-82
	16	DEPO of Paul Trammell taken 8-10-82
	16	DEPO of Roger Kendrick taken 8-10-82
	16	MOTION FOR PROTECTIVE ORDER by TWA re: depo of Robert E. King
	20	MEMORANDUM IN OPPOSITION TO MOTIONS SERVED 8-13-82 by TWA
	20	MEMORANDUM SUPPLEMENTAL IN SUPPPORT OF MOTION FOR SUMMARY JUDGMENT by TWA
	24	REPLY TO FED DEFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND IN OPPOSITION TO PLT'S CROSS MOTION FOR SUMMARY JUDGMENT AND TO DEF TWA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ALL REMAINING ISSUES by plt
	24	OPPOSITION TO TWA's MOTION FOR PROTECTIVE ORDER by plt

DATE	NR.	PROCEEDINGS
1982		
	24	CERTIFICATE OF SERVICE of Reply, Opposition, and Proposed Order
	25	PROCEEDINGS ON HEARING ON ALL PENDING MOTIONS R40/D89 EAK
		Counsel argue Plaintiff Motion for Summary Judgment
		Court Denies Motion for Summary Judgment
		Court Sets this for Trial Tuesday 8-31-82 at 1:30 P.M.
		Counsel to Prepare Order
	25	MOTION TO STRIKE PLT'S REPLY by TWA's
	30	DEPO of Robert E. King taken on 8-16-82
	31	PROCEEDINGS ON NON JURY TRIAL R40/D248 EAK
		Counsel stipulate that all depositions, affidavits and responses should be treated as being introduced at trial
		Plaintiffs statement of issues filed in open court
		Counsel for plaintiff argues his position on the statement of issues
		Trial in recess until 9:30 A.M. 9-1-82
Sept	1	NON JURY TRIAL CONTINUED R40/D286 EAK
		Counsel for TWA Services argues its position
		Counsel for Federal Defendants argue their position
		Court Reserves Ruling

DATE	NR.	PROCEEDINGS
1982		
	1	DEPARTMENT OF LABOR WAGE DETERMINATION FILED AS COURT EXHIBIT #1 (Per Judge "K" O:
	1	DEPARTMENT OF LABOR FORM SF 98 FILED AS COURT EXHIBIT #2 (Per Judge "K" Order)
	24	MEMORANDUM OPINION EAK R40D0986 Ct counsel
	24	JUDGMENT that judgment is entered in favor of plts and against def to the that the SCA covers the Visitor Info Ctr Concession Agreemt at Kennedy Space center; that judgment is entered in favor of defs and against plt for the additional substantitive relief sought by plt; that the court retains jurisdiction of this cause for ruling on the issue of attorneys' fees and costs EAK R40D0984 Ct counsel JS6
Oct.	14	MOTION FOR LEAVE TO DEFER APPLICATION FOR FEES AND OTHER EXPENSES PENDING APPEAL by plts
	22	MOTION TO DEFER APPLICATION FOR ITS ATTORNEY FEES, AND/OR COST AND MEMORANDUM IN SUPPORT OF MOTION, AND RESPONSE TO PLT'S MOTION FOR LEAVE TO DEFER by def
11-10-82		NOTICE OF APPEAL from final Judgment of 9-24-82 by plt Ctc
11-10-82		MOTION TO AMEND MOTION TO DEFER APPLICATION FOR ITS ATTORNEY'S FEES, AND/OR COST AND MEMORANDUM IN SUPPORT OF MOTION AND RESPONSE TO MOTION FOR LEAVE TO DEFER

DATE	NR.	PROCEEDINGS
1982		
11-24-82		NOTICE OF CROSS APPEAL by def TWA Services, Inc.
11-24-82		NOTICE OF APPEAL mailed to 11th USCA and all counsel; appeal info sheet mailed to Mr. Blue, Counsel for TWA
12-01-82		ORDER DENYING MOTIONS TO DEFER APPLICATION FOR FEES AND OTHER EXPENSES; DIRECTING ALL PARTIES TO FILE MOTIONS FOR ATTORNEYS FEES NLT 12-31-82 AND OBJECTIONS NLT 1-14-82; SETTING HEARING FOR 2:00 P.M. 1-31-82 R41/D914 EAK
12-05-82		ADDITION $5.00 FILING FEE RECEIVED from appellant
12-13-82		RECEIVED FROM U.S.C.A.: Extension of time for filing transcript until 2/6/83.
01-06-83		MOTION to withdraw Application for Attorney's Fees and Costs
01-10-83		RESPONSE by Pltf's to Deft. TWO Services Inc.'s Motion to Withdraw Application for Attorney's Fees and Costs